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CHRONICLES AND MEMORIALS OF GREAT BRITAIN AND IRELAND

DURING

THE MIDDLE AGES.

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THE CHRONICLES AND MEMORIALS

OF

GREAT BRITAIN AND IRELAND

DURING THE MIDDLE AGES.

PUBLISHED BY THE AUTHORITY OF HER MAJESTY'S TREASURY, UNDER THE DIRECTION OF THE MASTER OF THE ROLLS.

On the 26th of January 1857, the Master of the Rolls submitted to the Treasury a proposal for the publication of materials for the History of this Country from the Invasion of the Romans to the reign of Henry VIII.

The Master of the Rolls suggested that these materials should be selected for publication under competent editors without reference to periodical or chronological arrangement, without mutilation or abridgment, preference being given, in the first instance, to such materials as were most scarce and valuable.

He proposed that each chronicle or historical document to be edited should be treated in the same way as if the editor were engaged on an Editio Princeps; and for this purpose the most correct text should be formed from an accurate collation of the best MSS.

To render the work more generally useful, the Master of the Rolls suggested that the editor should give an account of the MSS. employed by him, of their age and their peculiarities; that he should add to the work a brief account of the life and times of the author, and any remarks necessary to explain the chronology; but no other note or comment was to be allowed, except what might be necessary to establish the correctness of the text.

The works to be published in octavo, separately, as they were finished; the whole responsibility of the task resting upon the editors, who were to be chosen by the Master of the Rolls with the sanction of the Treasury.

The Lords of Her Majesty's Treasury, after a careful consideration of the subject, expressed their opinion in a Treasury Minute, dated February 9, 1857, that the plan recommended by the Master of the Rolls "was well calculated for the accomplishment of this important national object, in an effectual and satisfactory manner, within a reasonable time, and provided proper attention be paid to economy, in making the detailed arrangements, without unnecessary expense."

They expressed their approbation of the proposal that each Chronicle and historical document should be edited in such a manner as to represent with all possible correctness the text of each writer, derived from a collation of the best MSS., and that no notes should be added, except such as were illustrative of the various readings. They suggested, however, that the preface to each work should contain, in addition to the particulars proposed by the Master of the Rolls, a biographical account of the author, so far as authentic materials existed for that purpose, and an estimate of his historical credibility and value.

Rolls House,
December 1857.

HENRICI DE BRACTON

DE

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BY

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INTRODUCTION.

INTRODUCTION.

The present volume contains Bracton's treatise on the subject of an assise of novel disseysine, which in the printed work forms the first part of the fourth book. The fourth book itself has no special title assigned to it in the printed work, but in MS. Rawlinson C. 160 it is thus described: Incipit liber quartus de Assisis, qui dividitur in septem Tractatus. Quorum primus est de Assisa novæ disseysinæ. There is good reason for believing that the Editor of the printed work of 1569, whose text has been carefully followed by the Editor of the later print of 1640, was not acquainted with MS. Rawlinson C. 160; but, if by chance he was familiar with it, he has shown a wise discretion in his description of the fourth book by omitting the title "De Assisis," as it does not describe accurately its contents. Four only out of the seven treatises, which make up the fourth book, are on the subject of assises, to wit, the three first, which treat respectively of novel disseysine, of last presentation, and of the death of an ancestor, and the fifth, which treats of what is briefly termed "Assisa Utrum," in other words of the action to determine whether a given tenement was held in frankalmoigne, or was a lay-feud. The three other treatises comprised in the fourth book are respectively on the subject of a writ of consanguinity, an action for dower, and a writ of entry. It has been already observed in the introduction to the first volume of the present edition, that the

received division of Bracton's work into five books was probably not adopted until after the death of the author, and in some MSS., of which MS. Godbold in Gray's Inn Library may be cited as an example, no formal division of the work is found corresponding to the present division between the third and the fourth books. On the contrary the text of the last chapter of what is termed the third book is continued without a break, with the exception of the title "De Actionibus Civilibus," which is prefixed to what is now the first chapter of the fourth book, and this title accords with the context immediately following.

The above remarks are only intended to apply to the received division of Bracton's work into five books, and not to the order of arrangement of the subjects. It is evident, for instance, from a passage which occurs in Bracton's treatise, "De Acquirendo rerum Dominio," which forms the second book of the printed work, that when he composed that treatise he contemplated the subsequent discussion of the assise of novel disseysine as part of his general plan, if he had not already prepared the discussion of it. It would have been difficult for Bracton in treating of the dominion of property to avoid touching upon the topic of possession, which he treats very briefly in his second book, from a point of view identical with that of the Roman jurists (Digest, l. xli., t. ii., c. 3), as regards the twofold mode, in which possession may be acquired or may be lost, namely, mentally and corporeally. He then proceeds to distinguish a just possession from an unjust possession, and intimates that the subject will be found more fully discussed "in the treatise on the assise of novel disseysine."[1]

This passage in Bracton might at first sight be taken to refer to a treatise already drawn up, but a further

[1] Secundum quod inferius videri poterit in tractatu de assisa novæ disseysinæ. folio 39, vol. i. p. 366.

allusion is made by Bracton in his third book de Actionibus to the treatise on the assise of novel disseysine, in terms, which warrant the supposition that the treatise, as it has come down to us, was not at that time completed. For example, in the treatise de Actionibus Bracton speaks of the action or interdict, "Unde vi," having a twofold object in view, namely, to obtain restitution of the property of which the complainant has been disseysed, and to punish the disseysor, and he adds the words "according to what will be stated below in the assise of novel disseysine."[1] But when Bracton comes to treat subsequently *in extenso* of the assise of novel disseysine it will be found that the subject has assumed larger proportions at his hands, and that in the case of disseysine by unjust violence he defines the object of the assise to be threefold instead of twofold; namely, (1) the restitution of the property of which the complainant has been disseysed; (2) the punishment of the disseysor for a breach of the king's peace; (3) and damages to compensate the disseysee for the loss, which he has undergone by being dispossessed.

It is evident indeed from these passages, and others might be cited, which occur in the second and third books, that Bracton had in his mind from the commencement of his great work the connection between the principles of the Roman jurisprudence on the subject of possession, and those principles of jurisprudence which the judges itinerant were accustomed to act upon in giving effect to the King's writ of novel disseysine, and he has taken care in those earlier books to point out in terms the analogy between a plaint of novel disseysine and a possessory petition of the Roman law, whilst he traces the lineaments of the assise of novel disseysine in the Roman actio "Unde vi" and in the Prætorian interdict.

[1] Secundum quod inferius dicetur in assisa novæ disseysinæ. fol. 103 b., vol. ii. p. 146.

It is a moot question, whether the plaint of novel disseysine had been formulated in France before it was introduced into England. French jurists are not disposed to trace it further back than to the establishments of St. Louis (IX.), whilst it is open to discussion, whether an ordinance of Philippe le Hardi (III.) is not the first occasion, in which a settled form of proceeding was established in France in a matter which was of great importance at an epoch, when the title to property rarely rested upon incontestable proofs and it had become necessary to invest simple possession with an authority, which only the judgment of a court should overrule. If we could be certain, that the text which has come down to us of the Assises de Jerusalem was a faithful reproduction of the text of the original body of feudal jurisprudence, collected by the early crusaders and reduced into writing under the auspices of Godfrey de Bouillon, the founder of the mediæval kingdom of Jerusalem, we might be justified in supposing that the Franks had anticipated the Angevine monarchs of England, and had incorporated into their legal system the possessory doctrine of the Roman jurisprudence, before formal effect to it was given in England.

The more probable opinion would seem to be, that a jurisdiction in real actions before the Conquest was exercised in the county court before the shire-reeve by a sworn body of freeholders; that subsequently to the Conquest the trial of real actions had by degrees been drawn into the *Curia Regis*, which followed the king's household wherever he went; and that the change introduced by Henry II., by what has been termed the Great Assise, was to allow either a plaintiff or a defendant in a real action to have recourse to a recognition by twelve jurors, instead of a trial by battle, and this was permitted in a claim of possession equally as in a claim of property. The author of the Mirroir des Justices (L. 11, Ch. II., § 25), which was composed in the reign of Edward I., in

treating of the assise of novel disseysine, says, that by reason of the multifarious quibbles in evidence, and the great delays in examinations, exceptions, and attestations, Ranulph de Glanville drew up a certain assise, that recognitions on oath should be made by twelve men, the near neighbours, and this establishment was called an assise. The term "assise" unfortunately does not help us to determine the question. It does not appear to have been in use in England before the reign of Henry II., but it was in use both in Normandy and in Gascony at an earlier period in its primary sense, as signifying the session of a high court, in which the king or his commissioner presided, and its Latin equivalent was assisia or assisa. We find it used in this sense in the Coustumier du Pays et Duché de Normendie (Ch. XXIV.), where it is defined as "Assemblée de chevaliers et de sages hommes " avec le bailly en certain lieu et à certain terme, " qui contienne l'espace de quarante jours, parquoy " jugement et justice doibuent estre faictz des choses, " qui sont ouyes en court." In its secondary meaning the term "assise" was used to denote the decision or judgment of a high court, and in this sense the laws drawn up at Jerusalem by the crusaders under Godfrey de Bouillon have been entitled the "Assises de Jerusalem." It was in this secondary sense that the term "assise" was used in England in the reign of Henry II. to denote certain statutes of the Great Council of the realm, of which examples are found in the Assise of Clarendon, anno 1166, and the Assise of Northampton, anno 1176. There is, however, a third sense of the word, in which it is used by Glanville and by Bracton to signify the proceedings in a real action, under which a recognition by twelve jurors was had recourse to in the place of the duel. How the term "assise" came to be so used is not very clear, unless we are at liberty to suppose, that the substitution of the recognition by twelve jurors in the place of the duel was the subject of a

royal ordinance of Henry II., made with the assent of the great council, and styled an assise, and that this is the true import of the explanation given by Ranulph de Glanville, when he styled the assise "regale quoddam "beneficium clementia principis de consilio procerum "populis indultum." Mr. W. F. Finlason, in his valuable edition of Reeve's History of the English Law, which he has enriched with a series of learned notes and comments, vol. 1, p. 187, has expressed an opinion that there was no new ordinance or constitution established in the reign of Henry II. on the subject of real actions, but merely a new procedure to provide for trial by jury in the Curia Regis. We are disposed, however, to think that Mr. Finlason's suggestion does not quite satisfy the language of Glanville, who, in treating of the Magna Assisa, says "Ex æquitate autem maxima prodita est "ista institutio," and in treating of the recognitio de nova disseysina (L. XIII., c. 32 and c. 38) twice speaks of it as a *constitutio*.[1] We rather incline to agree with Professor Stubbs in his view, that many legislative acts of the reign of Henry II. are lost, and among them most probably the text of the Magna Assisa, and of the Assises of mort d'ancestor and novel disseysine, and this supposition in no way conflicts with Mr. Finlason's general view, that the Great Assise was simply the regulation of trial by jury, and its adaptation to the decision of real actions in the king's courts.

Mr. Reeve himself, in a note subjoined to his History (vol. I., p. 187, edition 1869), has expressed an opinion that the ancient printed text of Glanville, in the well-known passage already referred to, to wit, "Est autem "magna assisa regale quoddam beneficium clementia "principis de consilio procerum populis indultum," is

[1] Disseisito hujus constitutionis beneficio subvenitur, c. 32, pœna autem hujusmodi constitutionis est misericordia domini regis tantum, c. 38. Tractatus de legibus et consuetudinibus Angliæ.

not the original reading of the Tractatus, and that the epithet "magna" has been interpolated in this and other passages of Glanville by a later hand, at a period when the distinction between the Great Assise and other assises had grown familiar amongst lawyers. He grounds this opinion upon the reading of three MSS., which he describes as the Harleian, Cottonian, and Bodleian. Mr. Reeve, however, does not seem to have been acquainted with the text of the Tractatus as set out in the Chronicle of Roger de Hoveden, which has come down to us in a MS. (Reg. 14. C. 2.) in the British Museum, which is probably the oldest extant text of the Tractatus, written either by the hand of Hoveden himself, who was a contemporary of Glanville, or under his immediate superintendence, at the very commencement of the thirteenth century. This MS. confirms the particular conjecture of Reeve that the epithet "magna" does not occur in the passage above quoted, but it refutes his general statement that the epithet "magna" is an interpolation of a later hand in this and other passages of Glanville. Hoveden's MS. presents a reading of its own, which is not identical with that of the three MSS. cited by Reeve, namely, "Est autem assisa "*illa* regale quoddam beneficium," and the chapter itself is headed "Quid sit assisa,"[1] but the preceding chapter is headed "De Duello et *Magna Assisa*," and the text which immediately follows that heading is "Si "per duellum se defendere tenens elegerit contra pe- "tentem, predicto modo procedunt. Si autem in "*magnam assisam* Domini Regis ponere voluerit is "qui tenet vel petens," &c., and the chapter concludes "nullo autem interveniente quare assisa esse non "debeat, tunc per eam tam finaliter, quam per duel- "lum terminabitur negotium." It is obvious from the

[1] The reading in Hoveden's Chronicle is identical with the reading in MS. Cotton Claudius D. ii., which contains Glanville's Tractatus under the title of "Leges Henrici "secundi, sive Glanville."

text of this chapter, that the expression "assisa illa" in the next following chapter is identical with the Magna Assisa, and that the epithet "magna" is not an interpolation of a later period. Mr. Finlason, who hesitates to assent to Reeve's view that the epithet "magna" is not of contemporaneous origin with the Tractatus, does not omit to notice that the Mirroir des Justices and Bracton and Fleta support the reading contested by Reeve. Mr. Finlason might have added that the proceedings in "la graunt assise" are fully discussed by Britton, l. vi., ch. iv., § 14, whose work is certainly coeval with, if not earlier, than the Mirroir.[1] On the other hand, the account of the establishment of the assise of novel disseysine, which is to be found in the Mirroir, points to a reform in the procedure rather than to the first institution of a legal remedy for wrongful *dispossession*. That there must have been inherited from the Roman jurisprudence a legal method of redress in England equally as in other parts of the Western Empire in the case of wrongful dispossession prior to the reign of Henry II. can hardly be doubted, and it is permissible to believe that the Crusades, as they gave occasion to the absence of the owners of immoveable property for a longer term than a year and a day, which was sufficient under the feudal system to constitute a valid seysine of a tenement, so they caused a demand for a more speedy and less onerous remedy than a writ of right, to be enforced after many delays by the duel on the return of the pilgrim from the Holy Land. The jurisconsults under the feudal system had availed themselves of the Roman doctrine of *usucaption* to an extent, which gave rise to great abuses, the traditions of which

[1] We may add that reference is made to the Great Assise in the Domesday of Ipswich, published in the Appendix to the Black Book of the Admiralty, vol. ii., Rolls edition. This Domesday, which was drawn up in the reign of Edward I., purports to be the restoration of an older Domesday of the reign of King John.

lingered on in the reign of Henry III. and provoked a protest from Bracton. These deeply-rooted abuses may have rendered it necessary for the Crown judges to proceed with great caution in devising a remedy for them, and may partly account for the many vigils employed in ordering the new course of proceeding in cases of dispossession, by which a recognition by twelve jurors might be invoked in the place of the duel. Bracton himself speaks in a similar tone of the bounty of the prince in affording succour to a person disseysed through an assise of novel disseysine, contrived and invented after many vigils (fol. 164 b).

It hardly admits of doubt that to Ranulph de Glanville, in his office of Chief Justiciary of the Crown, is due the organisation of the legal procedure of the King's Court, whereby the Norman duel, which had displaced the Saxon ordeal, gave way in its turn to the recognition by a jury of twelve men. Ranulph de Glanville was evidently a legist of very high mark. As High Sheriff of Yorkshire he had taken upon himself to levy with the greatest promptitude the *posse comitatus* of the county, whereby he was enabled to defeat the invading army of the king of Scots, and to make the king himself his prisoner. He thereby put an end to a war, which threatened to cause great embarrassment to the English monarch, who was engaged already in a disastrous war with the king of France. Glanville's reward was his immediate promotion to the office of a justiciary in the king's court, and on the subsequent resignation of William de Luci, he was advanced to the high office of Chief Justiciary. There can be no reasonable doubt that the Tractatus de Legibus et Consuetudinibus Angliæ was drawn up under his own eye. The period had not passed away, when great warriors were also great legists. The history of the Assises de Jerusalem bears testimony to that fact, and it need cause no surprise to find that Ranulph de Glanville, having

resigned his office of Chief Justiciary on the death of Henry II. and the accession of Richard I., died at the head of an army of Crusaders under the walls of Acre in Syria, in company with Baldwin Archbishop of Canterbury.

The internal evidence of the Tractatus de Legibus et Consuetudinibus Angliæ throws light upon the time at which it was drawn up, inasmuch as two chirographs are cited in the eighth book, which are dated in the thirty-third year of King Henry II. This would correspond with the seventh year after Glanville's appointment as Chief Justiciary. The tone of the Prologue prefixed to the Tractatus, and generally cited as "Regiam Potestatem," which are the introductory words of it, is irreconcilable with any other supposition than that its author was a "Master in Israel," in other words had authority to expound *ex cathedra* the new procedure. This Prologue is prefixed to the Tractatus in Hoveden's Chronicle.

That Glanville had previously drawn up a collection of the laws of England we also know from the manuscript already referred to of Hoveden's Chronicle, which is preserved in the British Museum. This MS. contains another body of laws entitled "Liber de Legibus Angliæ "sicut teneri debent in regno Angliæ." The Chronicler says, under the year 1180, that in that year King Henry appointed Ranulph de Glanville Chief Justiciary of all England, by whose wisdom the underwritten laws were drawn up, which we call the laws of England.[1] This collection of laws purports to contain the laws established by William the Conqueror, to which is added a pedigree of the Dukes of Normandy from Duke Rollo down to King Henry II., and a column of law terms. It is followed

[1] "Cujus sapientia conditæ sunt "leges subscriptæ, quas Anglicanas "vocamus." Chronicle of Roger de Hoveden, Rolls edition, vol. ii., p. 215.

by a complete text of Glanville's Tractatus de Legibus et Consuetudinibus Angliæ, with a heading prefixed to it, announcing that the treatise was drawn up whilst Ranulph de Glanville held the governing helm as chief justiciary. The MS. in which these laws have been handed down to us is a remarkable fine MS. on vellum, in double columns, written in a noble hand of the earliest years of the thirteenth century. Professor Stubbs has given a careful account of the MS. in his edition of the Chronicle of Roger de Hoveden, published amongst the Rolls series, and he is disposed to think that the MS. is the most ancient and genuine version of Hoveden's compilation. Professor Stubbs has also established the fact that Roger de Hoveden compiled the greater portion of his Chronicle, extending from Christmas 1169 down to the spring of 1192, from the Chronicle known under the name of Benedict of Peterborough, which has also been edited by Professor Stubbs in the Rolls series. It is to be observed, however, that the author of the Chronicle of Benedict of Peterborough is silent as to the appointment of Ranulph de Glanville to the office of chief justiciary, nor has he inserted in his work either the collection of the laws of William the Conqueror or the Tractatus de Legibus et Consuetudinibus Angliæ. The insertion of these productions of the Great Justiciary, after the announcement of his appointment to his high office, is thus an original portion of Hoveden's work, and it may be readily accounted for by the fact that Hoveden was one of the clerks of King Henry II., and his employment in the Royal Chapel would enable him to have ready access to the legal records of the period. He was subsequently advanced to the office of Justice in Itinere for the Forests in the northern counties in 1189 before the death of King Henry II., and he has added in his MS., after the Tractatus of Glanville, the Articles of Assise and Regard of the Forest, as well as the Assise of Clarendon. These

legal compilations were no doubt collected and preserved by Hoveden during his employment at the Court of Henry II., and if the supposition is correct that he died shortly after the time when his Chronicle closes, namely, in 1201, the MS. in the Royal Library in the British Museum may with good reason be held to be a MS. executed during the lifetime of its author in the form, in which it has come down to us. The title prefixed to the Tractatus by Hoveden agrees with the first part of the title which is prefixed to it in all the printed editions, namely, Tractatus de Legibus et Consuetudinibus regni Angliæ tempore regis Henrici secundi compositus, justiciæ gubernacula tenente illustri viro Ranulpho de Glanvilla juris regni et antiquarum consuetudinum peritissimo. The title, however, which is prefixed to the ancient printed edition has the additional words, "Et illas solum leges continet et "consuetudines, secundum quas placitatur in Curia "Regis ad scaccarium, et coram justiciis ubicunque fue-"rint." The work according to these additional words purports to be not merely a manual of the procedure to be observed in the Curia Regis at Westminster, but also a manual of procedure for the king's justiciaries, wherever they might happen to be.

The organisation of justices itinerant commissioned by the Crown to visit the counties and to determine the pleas of the Crown, which had been withdrawn from the jurisdiction of the sheriff in the reign of Henry I., dates from the Assise of Clarendon, anno 1166, during the time when Richard de Luci held the office of chief justiciary. He had already done King Henry II. good service in framing the previous constitutions of Clarendon in 1164, which had a most important bearing on the relations of the Church to the State of England, and which Lord Chancellor Campbell has described as being the basis of the ecclesiastical polity adopted by England at the Reformation. The chief object of these constitutions

was to vindicate the authority of the King's court, by maintaining the distinction between the ecclesiastical and the civil jurisdiction, which had been introduced into England by William the Conqueror. They secured to the King's court, in the first place, the decision of all disputes as to the right of advowson and of presentation to churches. They established an appeal from the archbishop to the King. They introduced the "assisa utrum," by which the tenure of an estate alleged to be held in frankalmoigne was to be determined by a recognition of twelve jurors before the chief justiciary. They declared the tenure of the possessions of the bishops to be baronial, and their possessions on vacancies of the sees to be in the hands of the Crown. They restrained the free election of the bishops by the clergy, and prohibited the bishops from ordaining villeins without the previous consent of their lords. These constitutions, however, had no immediate bearing upon the legal procedure of the King's courts, further than as regards the mode of determining the tenure of property alleged to be held in free alms. The subsequent Assise of Clarendon, anno 1166, in the form in which it has come down to us in the MS. of the Chronicle of Roger de Hoveden, already referred to as being unique in containing the two law treatises of Glanville, appears to have introduced important changes in the administration of the criminal law, but it is altogether silent on the subject of civil actions. It is not until we come to the Assise of Northampton, anno 1176, that we find provision made that the justices itinerant shall hold recognitions by a jury of twelve men upon disseysines made since the time when the King came to England, after the peace made between him and the King's sons. The peace referred to in this article of the assise was made in 1175, and the King himself did not return to England before 1176 (Math. Paris, Hist. Angl., i. p. 393, Rolls edition). It is obvious that although the Assise of Northampton purports to be a renewal of a

previous assise made at Clarendon in 1166, subsequent to the constitutions of Clarendon of 1164, the article upon novel disseysine as it stands could not be the renewal of any article of a date as early as anno 1166.[1] Further, in the earliest writ of novel disseysine which has come down to us, and which is preserved in Glanville's treatise, the limit of the inquiry is thus specified by the King, "post ultimam transfretationem meam in "Normanniam," which may reasonably be taken to refer to his expedition to Normandy in 1174. The Assise of Northampton seems to have revived some articles of the Assise of Clarendon, but it is for the most part an original legislative Act.

That Glanville's services were employed by the King in giving effect to the provisions of the Assise of Northampton is evident from his name appearing in the list of justices itinerant appointed at the great council held at Northampton, by which England was divided into six circuits, and three judges were nominated to each circuit (Chronica Rogeri de Hoveden, vol. ii., p. 87, Rolls edition). There is reason, however, to believe that prior to the Assise of Northampton there had been annual visitations of the King's justiciaries to carry out the provisions of the Assise of Clarendon in criminal matters, inasmuch as the regular series of "Nova Placita et Novæ Constitutiones," which is entered in the Pipe Rolls as held before the King's justiciaries, commences in 1166. The earlier Pipe Rolls contain matters apparently of a fiscal rather than a judicial character transacted before the sheriffs, with an occasional mention of placita heard before the chief justiciary or the justiciary of the forests. The entry of these "nova placita" in the Pipe Rolls raises a fair presumption, that the assise of Clarendon of 1166 is the true commencement of a

[1] The text of the Assise of Northampton may be referred to in the so-called Chronicle of Benedict of Peterborough, Rolls edition, vol. i., p. 198.

legislative reform, of which the memory has almost passed away in consequence of the greater importance of the Assise of Northampton on the one hand, and the confusion made by subsequent historians between the Assise and the Constitutions of Clarendon. It would also appear from the entries in the Pipe Rolls already mentioned, that Ralph de Luci, the predecessor of Glanville in the office of chief justiciary, was indefatigable in his endeavours to give effect to the Assise of Clarendon by annual visitations of the counties, but the visitations of the King's judges were ineffectual to check the oppressions and exactions of the sheriffs, who were for the most part local magnates, and held their office of sheriff for life. By a vigorous effort, however, Henry II. swept away, in 1170, the majority of the existing sheriffs, against whom grave charges of exaction had been made, and he substituted in their place members of the Curia Regis and of the King's Exchequer, and so paved the way for a better administration of justice, both in the county courts and in the courts of the justices itinerant, after they had been effectively organised in pursuance of the Assise of Northampton. It is not until after this assise that the title of "Justitiæ Itinerantes" first appears in the Pipe Rolls, although the earlier title of "Justitiæ errantes" continued in occasional use. The visitation of the new itinerant justices failed to give general satisfaction. Peter of Blois, in a letter addressed to the King (Letter XCV.) thus writes: "Ipsos enim justitiarios, quos vulgariter "errantes vel itinerantes dicimus, dum errata hominum "diligenter explorant, frequenter errare contingit." The result appears to have been that most of the eighteen judges, who had been appointed to the six circuits established by the Assise of Northampton in 1176 were relegated to other functions before 1178, whilst the circuits were redistributed in 1179, and in 1180 Ranulph de Glanville alone of the judges itinerant of 1176 was re-appointed. It is in this year

that the kingdom was arranged into four new circuits, the northern circuit being assigned to six judges, of whom Glanville was one, and these six judges are stated by Roger de Hoveden to have been specially assigned to hear the complaints of the people in the Curia Regis.[1]

A most fitting occasion now presented itself for reducing into writing the procedure, which should be henceforth observed in the Curia Regis, and this we conceive to have been the great service performed by Glanville in drawing up his treatise on the laws and customs of England. Whatever may have been the faults in the character of Henry II., his persistent efforts to secure a due administration of justice to all classes of his subjects entitle his memory to the grateful respect of the English nation. He broke down the local tyranny of the sheriffs of the counties, and subordinated them to the supervision of the King's judges, but a further step was required, and it was by a subsequent assise of King Richard I. that the sheriffs were forbidden to act as justiciaries in their own counties. In the next following reign they were restricted further by the Great Charter of King John from holding pleas of the Crown under any circumstances, and by the same legislative act the justices itinerant were revived. Within a few years, however, as their annual visitations were found to be burdensome to the king's subjects from their functions being fiscal as well as judicial, their visitations were made septennial, until they were finally superseded by justices of assise.

A short half century had passed away, when we find that the remedy by writ of disseysine had come to be applied in the reign of Henry III. to many matters, which were not considered to be within its scope at the

[1] Isti sex sunt justitiæ in curia regis constituti ad audiendum clamores populi. Chronica Rogeri de Hoveden, vol. ii., p. 190.

time when Glanville drew up his treatise. It was obvious that, as soon as a reasonable mode of redress for wrongful dispossession had been established by the institution of the assise of novel disseysine, the judges of the Curia Regis would find it extremely convenient for the purposes of justice to admit within the scope of that assise, not merely cases of actual dispossession, but cases of obstruction to the full enjoyment of immovable property and its appurtenances. Thus we find that in the time of Bracton a disseysine was held to take place not only where the owner or his agent, who was in actual seysine, was ejected from his freehold unjustly and violently without a judgment, but also where possession was taken of a tenement in the absence of the owner, and he was denied admission to it on his return from market or elsewhere. Further, it was a disseysine where a person was obstructed in the enjoyment of an easement appurtenant to his freehold, or where an improper use of an easement within his freehold was made by another person. Again, if a person was distrained for services which were not due, or, which where they were due, exceeded the limits of a reasonable distress, this was a disseysine. In fact disseysine had come to be divided into simple disseysine and violent disseysine, and the latter was distinguished according as it was effected by force or by armed force. Further, in accordance with the Roman jurisprudence an owner was held to be disseysed of his land when he was deprived of his liberty to use it, although he continued to be on the land itself, and further simple disseysine was held to take place, where an intruder unjustly contested the rights of the possessor. Perhaps the most strained application of the action for disseysine is found in the statement of Bracton (fol. 205, 205b), that it might be brought in certain cases, where an owner was wrongfully put out of possession through a wrongful judgment of a court, but in applying the doctrine of disseysine to such a case

the King's justiciaries had the countenance of the canon law (c. 7, X. de restitutione spoliatoris, 2, 13).

Professor Carl Güterbock, in his work on "Bracton, and his relation to the Roman Law," has pointed out in the chapter on the assise of novel disseysine many striking analogies between the provisions of the Roman law and the application of the assise of novel disseysine in Bracton's time, and as the assise had not originated in the general customary law of England, the judges who had to give effect to it, being for the most part ecclesiastics versed in the civil law, felt themselves at liberty to have recourse to the Roman possessory actions as models, whereupon to frame a new jurisprudence upon an independent platform indeed, but upon a platform consistent with the Roman theory of possession, of which the general principles had been already adopted by English jurisconsults. At the same time the English judges kept in view the "remedium spoliationis" of the canon law, more particularly as regards the fiction of law, under which the doctrine of quasi-possessio was applied to prædial servitudes. According to Bracton (fol. 52b, 53) easements were the subject of quasi-possessio, so also common of pasture, so also tolls, markets, and franchises, so also the right of presentation to churches, and this *quasi-possessio* might be lost like *possessio* itself either by non-user or by obstruction to the user.

That the general principles, as already observed, of the Roman doctrine of possession were adopted by the English judges in their administration of the law in Bracton's time may be inferred from the distinction, which he makes at the commencement of his treatise on the assise of novel disseysine between the possession of things and the property of things, and between the different degrees or modes of possession, in which he repeats in substance what he has previously laid down in his chapter on the acquisition of the dominion of things (vol. i. p. 304). Bracton had evidently before

him in treating of possession on both of these occasions the language of Azo in his Summa on the seventh book of the Code of Justinian (p. 740, Ed. Venetiis apud Franciscum Bindonum, 1566), for he uses the very language of Azo in drawing a distinction between possessio and quasi possessio. Further, in the scale which he makes of the different proportions, in which the element of fact and the element of law may be combined in the various modes of possession, he seems also to have borrowed his phraseology from Azo. Bracton, however, does not on this occasion follow Azo implicitly, as he omits a category of possession which Azo enumerates, and here, as in several other places Bracton must be taken to have exercised a discretion in his use of the Roman Gloss-writers. He was not seeking to introduce the practice of the Roman law into the assise courts by a side door as it were, which has been the contention of M. Houard, who has on that ground omitted to include Bracton's work in his collection of Coutumes Anglo-Normandes, but he has sought to familiarise the judges itinerant with the application of the general principles of law as a science, the knowledge of which had been hitherto the privilege of the high Justiciaries of the Bench, and had been jealously preserved amongst them by confining its transmission to oral tradition, and not divulging it in writing.

Ranulph de Glanville had the advantage of being associated in the discharge of his functions of Justiciary in the Aula Regis with three eminent ecclesiastics, Richard bishop of Winchester, Godfrey bishop of Ely, and John bishop of Norwich. It has been thought that the representations of Peter of Blois, in his letter to King Henry II. already cited (Letter 95), influenced the King in nominating the three bishops as joint commissioners (arch-justiciaries) with Glanville in the work of legal reform, notwithstanding the promulgation of the decrees of the General Council of Lateran (XIth), forbidding any

ecclesiastic from executing the office of justiciary to a temporal prince or other secular person on pain of forfeiting his ecclesiastical ministry. It appears that Pope Alexander the Third had threatened the Archbishop of Canterbury on this occasion to punish him, if he did not punish the three bishops according to the Lateran canons, but the Archbishop did not hesitate to represent to the Pope the great advantage which the presence of the bishops in the Aula Regis worked both to the State and to the Church, and the mischief which would accrue to the Church, if the advice of the bishops was withheld from the King. "Unum noveritis," is the language of the Archbishop, "quia nisi familiares et con-
"siliarii regis essent præfati episcopi, super dorsum
"ecclesiæ fabricarent hodie peccatores, et immaniter ac
"intolerabiliter opprimeret clerum præsumptio laicalis"
(Letter 84). The result appears to have been that the non-observance of the Lateran canons by the English bishops was connived at, but the bishops henceforth abstained from hearing criminal causes in the King's courts, where sentence of death was the probable penalty. It need cause no surprise after this compromise to find that in the reign of Henry III. the justiciaries, whose opinions are most frequently cited by Bracton, are dignified ecclesiastics. Martin de Pateshull, whose judgments are the most frequently appealed to by Bracton, as illustrating the application of certain definite principles of law, was Dean of the Cathedral of St. Paul's, London, and William de Ralegh, who is the next most frequently cited, was canon of more than one cathedral church and was treasurer of Exeter Cathedral, in which Bracton himself had a stall as archdeacon. It is in Bracton's pages that we find a certain degree of light thrown upon a period in the history of English law, which is left in some obscurity by the chroniclers of the reign of Henry III., and of which the records are not forthcoming amongst the rolls of that King's reign. Mr. Foss,

in preparing his History of the Judges of England, does not seem to have been aware of the value of Bracton's various references to the Itinera of the King's Justiciaries, otherwise he would not have stated that "Martin de Pateshull was raised to the bench very soon "after the accession of Henry III.," neither would he have stated that Martin de Pateshull died in 1229 (14 Henry III.), for Bracton mentions facts, which show that Martin de Pateshull was a justiciary before the reign of Henry III., and that he continued to go circuit so late as the 16 Henry III. Thus he cites a judgment of Martin de Pateshull in the last chapter of his Treatise on Essoins (folio 364), which was delivered by him on a Leicester Iter in the reign of King John, whilst he also cites two judgments of Martin de Pateshull delivered by him respectively at Lincoln and at Lancaster in his last Iter in 16 Henry III. (fol. 50 b.). The latter of these is a very remarkable judgment, being an instance of a new trial in which a previous verdict of twelve jurors at Lincoln was reversed in the same year by a jury of thirty-six knights at Lancaster before the same judge, and the Lincoln jurors were convicted of perjury. A similar observation will apply to Mr. Foss's account of William de Ralegh, as regards the period during which he continued to discharge the duties of a justiciary. Mr. Foss has been misled by the circumstance, that no fines appear to have been paid at Westminster in the presence of William de Ralegh after 19 Henry III., and he says that beyond that date there is no evidence of his acting as a judge. Bracton on the other hand recites the text of the Constitution of Merton, enacted in 20 Hen. III., on the subject of the coarctation of common of pasture, as having been drawn up by William de Ralegh at that time justiciary, and he quotes in two places in his Treatise on the Assise of Novel Disseysine, folio 169 b., folio 200, a judgment of William de Ralegh delivered by him in an assise held before the King

himself at Cateshull, in the county of Norfolk, in 23 Hen. III.

So far there is evidence that William de Ralegh continued to fill the office of justiciary in the Curia Regis until he was promoted to the bishopric of Norwich, to which he was elected on 10th April 1239 (23 H. III.). His consecration took place in St. Paul's Cathedral on 24 Sept. following, and there is no subsequent record, as far as we are aware, in which his name appears amongst the justiciaries of the King's court. The subsequent career of this distinguished statesman and prelate has been already sketched by us in the Introduction to Vol. II., p. xliii. It has been observed that Bracton assigns the drawing up of the Constitution of Merton to William de Ralegh. The reference to William de Ralegh on this occasion as justiciary is not part of the text of Bracton, as in the case of the plea heard before the King himself in 23 Henry III., but it occurs in the heading or title prefixed to Bracton's text of the Constitution of Merton in certain manuscripts of the early part of the reign of Edw. I., as, for example, in both the Rawlinson MSS., which are of that period.

Bracton says, in his text (folio 227), "Est tamen "quædam constitutio, quæ dicitur Constitutio de Mer- "ton, per quam etiam invito eo, cui servitus debetur, "communia coarctatur, unde primo videndum est, "qualis est illa constitutio, et est talis." Bracton then proceeds to set forth the well known text of what is printed by the editors of "The Statutes of the Realm," as the fourth paragraph of the so-called Provisions of Merton, commencing, "Item quia multi magnates," &c., to which is prefixed the heading above mentioned, "De "Constitutione de Merton per W. de Ralegh tunc "justiciarium." There is nothing in the phraseology of this heading which should indispose us to accept it as emanating from Bracton himself, as Bracton has previously applied the same epithet to William de

Ralegh in his Treatise de Corona (folio 144b), when he cites a case, in 18 H. III., where a person had killed a thief in the night, and was pardoned by King Henry III., when tried before the King himself at Windsor and before William de Ralegh at that time justiciary (tunc justiciario), vol. ii., p. 464.

The circumstance that Bracton cites, as the Constitution of Merton drawn up by William de Ralegh, only one paragraph of the Provisions of Merton, as published by the Record Commissioners, in 1810 from a MS. in the British Museum (Cotton, Claudius, D. 11, f. 142), which purports to be a transcript of the "Magnus " Rotulus in Turri Londinensi," need not throw any suspicion on the contemporary character of the other paragraphs of the Provisions, at least as regards the first five paragraphs. They are all set out in the Close Rolls of 20 H. III. (m. 18.), in which the King's writ is enrolled, which is directed to the sheriffs throughout England and to the justices of eyre in Hants and Wilts, whereby the new Constitution is ordered to be read in the full county court and firmly kept. A text of the first five paragraphs under the title of the Statutes of Merton is also given by Matthew Paris, a contemporary of Bracton's, under the year 1236, in his Chronica Majora vol. iii., p. 341, Rolls edition, and an identical text has also found a place, under the title of Leges de Merton, in the Annals of Burton, Rolls edition, p. 250. In both of these works the text of the fourth paragraph is almost identical with that which is published by the Record Commissioners from the Cotton manuscript in the British Museum, but they all differ slightly from Bracton's text, which again differs from the text of the Nova Constitutio, which is entered in the Close Rolls. For instance, the text of the fourth paragraph in the Close Rolls is as follows:

Item quia multi magnates de regno nostro, qui feoffaverint milites et libere tenentes suos de parvis

tenementis in magnis maneriis suis, questi fuerunt, quod commodum suum facere non potuerunt de residuo maneriorum suorum, sicut de vastis boscis et pasturis, desicut ipsi feoffati sufficientem possunt habere pasturam, quatenus pertinent ad tenementa sua, ita provisum est et a nobis concessum.

Quod cum hujusmodi a quibus[cunque] feoffati assisam nove disseisine deferant de communia pasture—

1. Si coram justiciariis cognoverint, quod sufficientem pasturam habeant quantum pertinet ad tenementa sua, et habeant ingressum et egressum de tenementis suis usque ad pasturam illam, tunc inde sint contenti et illi, de quibus questi fuerint, quieti recedant de hoc, quod commodum suum de terris vel vastis vel pasturis fecerint.

2. Si autem dixerint, quod sufficientem pasturam [non] habuerint vel sufficientem ingressum vel egressum quantum pertinet ad tenementa sua, tunc inde inquiratur veritas per assisam.

i. Et si per assisam recognitum fuerit, quod per eosdem in aliquo fuerit impeditus ingressus et egressus, vel quod non habeant sufficientem pasturam sicut predictum est, tunc recuperent seisinam suam per visum juratorum, ita quod per discrecionem et sacramentum ipsorum habeant conquerentes sufficientem pasturam, et ingressum et egressum sufficientem in forma predicta, et disseisitores in misericordia et dampna reddant, sicut prius reddi solent ante provisionem istam.

ii. Si autem recognitum fuerit per assisam, quod conquerentes habeant sufficientem pasturam cum libero ingressu et egressu, sicut predictum est, tunc licite faciant alii commodum suum de residuo, et de assisa illa recedant quieti.

On the other hand the text presented to us by Bracton, as drawn up by William de Ralegh, is as follows, and we

have italicised those parts, in which it differs from the text of the Close Rolls:

Quia multi sunt magnates, qui feoffaverunt milites et libere tenentes suos de parvis tenementis, *et qui impediti sunt per eosdem,* quod commodum suum facere non *possunt* de residuo maneriorum suorum, sicut de vastis, boscis et pasturis *magnis,* desicut ipsi feoffati sufficientem habere possent pasturam, *scilicet quantum ad tenementa sua pertinet, ideo* provisum est et concessum, *ab omnibus,* quod cum hujusmodi feoffati a quibus cunque *arramaverint erga dominos suos* assisam nove disseysine de communia pasture *de hoc quod aliquam partem tenementorum suorum excoluerint,* si coram justiciariis cognoverint quod sufficientem habeant pasturam, quantum ad tenementum suum pertinet, *cum libero ingressu, et egressu et chaceam* de tenementis suis usque ad pasturam illam *vel viam,* tunc inde sint contenti, et illi de quibus tales questi *sunt,* quieti *sint* de hoc, quod *commodum suum ita fecerint de terris, vastis et pasturis suis.*

Si autem dixerint quod sufficientem pasturam, non habuerint, *quantum pertinet ad tenementa sua, cum sufficienti ingressu et egressu,* tunc inde inquiratur veritas per assisam.

Et si per assisam recognitum fuerit, quod *in aliquo impediverint ipsius domini ingressum vel egressum,* vel quod [non][1] habeant sufficientem pasturam, (secundum *quod* predictum est) tunc recuperant *querentes* seysinam suam per visum *recognitorum,* ita quod per discretionem et sacramentum *eorundem* habeant conquerentes sufficientem pasturam *cum sufficienti et competenti ingressu et egressu* in forma predicta, et disseysitores in misericordia et damna reddant, sicut prius reddi solent ante provisionem istam.

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[1] The omission of the "negative" particle is a singular defect of the ancient printed text of Bracton.

"Si autem recognitum fuerit per assisam, quod *que-*
" *rentes* sufficientem habeant pasturam cum libero in-
" gressu et egressu, secundum quod predictum est,
" tunc licite faciant *domini* sui commodum de resi-
" duo."

Bracton's text continues, "et in quo casu, si quis
" liber homo feoffatus fuerit per aliquem et occasione
" alicujus assise capte vel alia occasione, vel si non
" permiserit dominum suum includere, vel si cum in-
" cluserit, hayas suas fregerit et fossata, vel muros
" suos prostraverit per vim, cui resisti non poterit,
" competit domino breve domini regis in hac forma."

Bracton's continuation of the text, "et in quo casu,
" etc.," is evidently not intended by Bracton to be taken as part of the Constitution, but rather as connecting the Constitution with the writ which follows in the next paragraph, to which there is prefixed the following heading or title:—"Breve de Constitutione de Merton secun-
" dum quod tunc provisum fuerit per W. de Ralegh
" Justiciarium." We think it reasonable to hold that this heading, which is found in manuscripts of the early years of Edward I., was intended by Bracton to denote that the writ which follows it was drawn up under the direction of W. de Ralegh, as Justiciary of the Crown, to give effect to the Constitution, which by itself may be described as a "Statute to encourage tillage."

But how shall we account for the variation between the text of the Constitution, which is presented to us by Bracton as provided by William de Ralegh, and the text of the Constitution as entered in the Close Rolls? Are we to consider the text as it has come down to us in Bracton as the "provision" or "bill" prepared by William de Ralegh, and the text in the Close Rolls as the law which was approved by the King and his Council? or may we regard Bracton's text as the version of the Constitution, which was drawn up by William de Ralegh and was in use under his authority? It deserves remark

that Bracton's text contains something more in favour of the commoners, than the text which has been admitted into the authorised version of the Statutes of the Realm; namely, it specifies that the commoners are entitled to a drove-way (chaceam) in addition to free ingress and egress. Was the word "chacea" struck out of the Bill as provided by William de Ralegh, and did the barons only consent to ingress and egress being secured to the commoners? or was a drove-way a common law right implied under the terms "ingress and egress?" Thus we find it laid down in Britton, l. ii., ch. xxx., § 2, that "unto common in another's soil there appertains a "drove-way (chace) and free entry and free egress, "although the drove-way may be hurtful,"[1] and Britton states that it was a nuisance, which might be assigned before the justices, "if the way be narrowed, so that a "man cannot drive a waggon or a cart therein as he "ought or used to do, although room may be left for "horses and for beasts;" and Britton may be taken to have had before him, when he compiled the above passage, another portion of the text of Bracton (fol. 232), in which Bracton states it to be a tortious nuisance for any one to obstruct a road or drove-way (chaceam) by which a person is accustomed to enter a pasture-ground. Again, Bracton says, fol. 232 b.:—"Likewise, if he permits him "to go, yet does not permit him to go for the due use "appointed in the servitude, as if a person ought to have "a road for a cart or a car, and he does not permit him "to have more than a footpath or a bridle-way and a "narrow ingress, the tortious nuisance may be removed "by an assise and by a writ 'Quare obstruxit vel coarc-"'tavit aliquo modo supradictorum.'" This question is not altogether without practical interest in the present day, as "the Constitution of Merton to encourage tillage"

[1] Car à communer en autri soil apent chaçe et fraunche entre et fraunche issue, tut soit la chace damageouse.

is still on record in the statute book, being the first on the list of the Statutes, which have been reprinted amongst the Revised Statutes of 1870.

The epithet "novel" as applied to disseysine in the text of Glanville, l. xiii., c. 32, has a definite meaning reflected upon it by the writ which follows it, namely, that it implied a disseysine effected since the last voyage of King Henry II. to Normandy, but Glanville states that it is within the discretion of the King, with the advice of his Council, to vary the limitation of the action. Glanville's words are, "infra tempus a domino "rege de consilio procerum constitutum, quod quando-"que majus quandoque minus censetur."

Mr. Finlason, in his comments on Reeve's History of the English Law, vol. 1, p. 231, observes that the passage "quod quandoque majus, quandoque minus censetur" lies under some suspicion of interpolation, and has been perhaps for that reason put between brackets by the editor of the printed text of Glanville. The passage, however, occurs in the oldest extant text of Glanville's Tractatus, to which we have already had occasion to refer, namely, the text which has been handed down to us in the manuscript of the Historia Rogeri de Hoveden, preserved in the King's Library in the British Museum. The only difference to be found between the text of Hoveden's manuscript and the vulgate text of Glanville's Tractatus consists in the insertion of the words "ad hoc" before "constitutum."

The chapter of Bracton (cap. xlix.) on re-disseysine is also of interest as regards the "Statute of Merton," inasmuch as it is identical in substance with a portion of the third paragraph of the text as printed by the Record Commissioners of 1810.

Bracton's text is as follows, fol. 236:—"Si quis autem "disseysitus fuerit de tenemento suo vel aliquo, quod "pertineat ad tenementum suum, et coram justiciariis "itinerantibus seysinam suam recuperaverit per assi-

" sam quamcunque, vel per recognitionem eorum qui " disseysinam fecerint, et ipse disseysitus per viceco- " mitem seysinam suam habuerit, si vero disseysitores " postea post iter vel infra eum qui recuperavit iterum " disseysiverint et inde convicti fuerint, statim capi- " antur et in prisonam domini regis detineantur, quo- " usque per dominum regem vel alio modo deliberen- " tur." Bracton then proceeds to give the text of the writ, which in such a case should be addressed to the viscount, which directs him to arrest the culprit and to cast him into prison; and after reciting the writ adds: " Talis quidem, qui ita convictus fuerit, dupliciter de- " linquit contra regem, quia facit disseysinam et robe- " riam contra pacem suam, et etiam ausu temerario " irritat ea, quæ in curia domini regis rite acta sunt: " et propter duplex delictum merito sustinere debet " pœnam duplicatam. Et eodem modo fiat de illis, " qui alios ejecerint de seysina qualitercunque vel de " quacunque re seysinam suam recuperavint in curia " domini regis per assisam, recognitionem, juratam, " judicium, concordiam, vel alio quocunque modo." The passage above quoted serves to illustrate the difference between the criminal law as administered by the justices itinerant and the criminal jurisprudence applied by them to its administration. The Statute of Merton gives the law in its third paragraph :—

" Item si quis fuerit desseisitus de libero tenemento " suo et coram justiciariis itinerantibus seisinam recu- " peraverit per assisam nove disseisine, vel per cogni- " tionem eorum qui disseisinam fecerint, vel quocunque " alio modo per judicium curie nostre, et ipse disseisitus " per vicecomitem seisinam suam habuerit, si iidem " disseisitores postea post iter justiciarorum vel infra " iterum eundem conquerentem disseisiverint et inde " convicti fuerint, statim capiantur et in prisona nostra " detineantur, quousque per nos pro redemtione vel alio " modo deliberentur." This is evidently the written law

which Bracton had before him in drawing up his text which introduces the writ, but the written law stops short at imprisonment, and Bracton, after reciting the writ which follows strictly the written law, proceeds to state the principles of jurisprudence, which warrant the infliction upon the culprit of a double punishment. It is not immaterial to remark, that the same paragraph of the provisions of Merton as entered in the Close Rolls embraces within it other offences, "Eodem modo fiat "de illis qui seisinas suas recuperaverint per assisam "mortis antecessoris et similiter omnibus aliis, qui "terras et tenementa quocunque modo in curia "nostra per juratam recuperaverint vel quocunque "alio modo per judicium curie nostre, et postea dis-"seisiti fuerint a prioribus deforciatoribus versus quos "recuperaverint." This concluding portion of the third paragraph is evidently the groundwork on which Bracton has built up his general statement, which he extends slightly beyond the letter of the statute, and with which he concludes his comment on the writ.

A strange feature at first sight of the law of disseysine is that it was permissible for the party disseysed to use force to oust the disseysor, and to recover possession, provided he did so "incontinenter," or, as it was termed, "flagrante disseysina." This may be regarded as a compromise between the new law and the old practice, under which the legislator sought to regulate the old practice of forcible re-entry and bring it within reasonable limits, leaving it to time to work a more complete change, as the benefit of the assise came to be generally appreciated. Glanville is silent as to any *tempus utile* for re-ejectment, but Bracton discusses the question at length, limiting the time, if the disseysee has been present at the disseysine, to the third or fourth day, but if he has been absent and yet within the Realm of England, then it would appear to have been within the discretion of the judge to allow a longer time, and

Bracton expresses on his own part an opinion, that fifteen days might in certain cases be a reasonable limit, but so long a limit he admits was not in his time allowed. Bracton, however, goes on to specify the periods allowable for re-ejectment in the case where the disseysee was on a pilgrimage to St. James of Compostella, or in the service of the King in Gascony, in which case he was allowed a delay of forty days and two floods and one ebb to return to England, and of fifteen days and four days within the realm; and if by chance he should be absent on a special pilgrimage to the Holy Land, he was to be allowed a delay of a year beyond the realm and of fifteen days and four days within the realm. Further, if he was absent on a general pilgrimage to the Holy Land, then he was to be allowed a delay of three years and fifteen days and four days as aforesaid. It would seem that the limit in all the above cases was laid down according to the rule hitherto observed in essoins in a writ of right. In all such cases, if the true owner should have re-ejected the intruder forthwith, the intruder could not have recourse to an assise of novel disseysine, but there was nothing to oblige the disseysee to have recourse to force, if he chose to proceed forthwith by a judgment. On the other hand, if the disseysee had recourse to force after the prescribed time, and re-ejected the intruder, the intruder himself might have recourse to an assise of novel disseysine. Such also was the law in the reign of Edward I., as stated by Britton in his chapter on disseysines, L. ii., ch. xiii., sec. 4. Mr. F. M. Nichols, in his recent edition of Britton, vol. 1, p. 294, appends a curious note in explanation of the limits of time allowed for the ejectment of a disseysor, which he has extracted from a MS. compiled by Sir John de Longeville, who was a justice of assise in the reign of Edward II. In this MS. it is said, "where the disseysine is done in the presence "of the disseysee, the disseysor must be ejected within "five days, because the law of ancient time granted that

" the disseysee should go one day to the East, the " second day to the West, the third day to the South, " and the fourth day to the North, to seek succour " of his friends all the country round. If he be dis- " seysed in his absence," then the MS. goes on to state the law as laid down by Bracton, and such continued to be the state of the law until the reign of Henry VI., when the statute to repress forcible entries (8 H. vi., c. 9), was passed, whereby every kind of forcible entry on property was prohibited, and in certain cases the disseysors were liable to be mulcted in treble damages. This is in accordance with what Bracton says, f. 187, "If the disseysor has committed a robbery with the " disseysine, he shall have a triple penalty, to wit, an " amerciment for the disseysine, imprisonment for the " breach of the peace, and a heavy ransom for the " robbery, but he shall not lose his life nor a limb for " the robbery, since the proceedings against him are not " criminal nor are they commenced by an accusation. " The disseysor shall also give to the viscount for the " disseysine an ox or five shillings, provided he is the " principal disseysor, but those who have been assisting " or accessory or advising shall give nothing, although " in some countries it is otherwise observed (I mean the " principal disseysor) according as they are one or more." Bracton has in a previous passage (f. 161 b.) alluded to this payment to the viscount in these terms, " A penalty " is also added that the principal disseysor, one and not " all, when they have been convicted by an assise, give " to the viscount an ox by custom, although not by " right." How this innovation crept in, that a money payment of five shillings might be substituted for a payment in kind, does not appear, but we may assume that it was found convenient for the sheriff to accept a money payment from the disseysor, as he might have no ox to present to the sheriff, but the commutation of the payment in kind seems to have facilitated the growth of an abuse, under which the sheriff came to levy an equal

payment of a like kind as a sort of court fee to be paid by the disseysee as well as by the disseysor, and it was found necessary to prohibit this malpractice by 13 Edw. I., ch. xxv., by which it was provided "And the "sheriff from henceforth shall not take an ox of the "disseisee, but of the disseisor only, and if there be "many disseisors named in one writ, yet shall he be "contented with one ox, nor shall he receive any ox but "of v s. and four pence price or the value." Hence we find in the articles of inquiry inserted by Bracton in his Treatise de Corona, which the Judges Itinerant were to issue on their circuit, the quaint provision, "De vice-"comitibus et aliis ballivis *ambidextris*, qui capiunt "ex utraque parte." Vol. ii., p. 249. This passage in Bracton is curious, as furnishing evidence of the money value of an ox in the reign of Henry III.[1] Reeve in his History has unfortunately marred this piece of evidence by writing "The disseisor, if he was the principal "in the fact, was also to give to the sheriff, on account of his disseisin, an ox *and* five shillings." Vol. 1, p. 351, Edition 1869.

We have already observed that Glanville states in his chapter on the assise of novel disseysine (L. xiii. c 32), that it rested with the King in Council to define within what period the inquiry of the justices itinerant should be limited, and the writ which he supplies limits the inquiry of the justices to disseysines, which have happened since the last voyage of the King to Normandy. On the other hand, the writ which Bracton supplies (fol. 179) limits the inquiry to the last return of the King

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[1] In the Liber Niger Scaccarii, temp. Henrici primi, a stalled ox payable by the tenant was commuted at a shilling according to Sir H. Spelman. About the year 1145 an ox, according to Matthew Paris, was worth 3 shillings. In 1298 the price of an ox at Scarborough, Yorkshire, was 6*s.* 8*d.*, so that five shillings may be taken to have been the money value of an ox in the reign of Henry III., which had increased to 5*s.* 4*d.* in 13 Edw. I.

from Britanny. There can be no doubt as to the limit of time laid down in Glanville's writ, namely, that it has regard to the voyage of King Henry II. to Normandy in 1184, but it is not so clear, what is the limit intended in Bracton's writ, when it speaks of the last return of the King from Britanny. The same limit of time is also laid down by Bracton in a writ to remove a nuisance to a freehold (fol. 232 b.). Matthew Paris states that King Henry III. crossed the sea from Portsmouth to St. Malo in Britanny with an army in 1230; that he passed thence into Gascony to receive the homage of his subjects there, and that he returned from Britanny into England in the month of October in the same year. Now we find a limitation laid down in one of the paragraphs, which are linked with the Provisions of Merton as printed in the Statutes of the Realm of 1810, under which writs of novel disseysine were not to carry back the inquiry beyond the first voyage of King Henry III. into Gascony, "primam transfretationem domini regis, "qui nunc est, in Vasconiam." There is no difficulty in identifying the first voyage of King Henry III. into Gascony with the voyage of that King in 1230, and this might well be the limit of time intended in the Provisions of Merton. On this supposition the limitations laid down in the writs cited by Bracton are probably no other, although they are expressed in different terms as dating from the King's return from Britanny, which took place in the selfsame year in which he went into Gascony. Reeve in his History, vol. 1, p. 66, expresses a difficulty in accounting for what he calls this want of agreement between Bracton and the provisions of Merton; and even Lord Coke (2 Inst. 95), as remarked by Mr. Coxe in a note appended to his translation of Guterböck, appears to have thought that Bracton and the Statute of Merton referred to two distinct voyages. We have ourselves, relying on the authority of Lord Coke, intimated the same opinion in a note appended to the

present volume, p. 139 and p. 564, but we now think otherwise. Matthew Paris, in his Historia Anglorum, vol. ii., p. 328, Rolls edition, has handed down the precise date of King Henry the Third's return from Britanny, namely, the 26th October (vii kalendas Novembris), A.D. 1230, and it is not an improbable conjecture, that the King's judges drew up the writ in the form, in which Bracton has handed it down to us, considering the voyage of the King to have been completed by his return to a port in England, the Provisions of Merton being to the effect that the inquiry should not be carried back beyond that voyage. We speak of the Statute for the Limitation of Writs as part of the Provisions of Merton, being linked with them in the Statutes of the Realm published by the Record Commissioners in 1810 after the text of the manuscript in the Cotton Collection in the British Museum (MS. Claudius, D. 11), the Court, however, or Council in which this statute was made appears to have been held on 5th February 1237 (21 Henry III.), in the year following that in which the Constitution of Merton for the encouragement of tillage was enacted, but in some manuscripts the proceedings of both Councils, or as some writers have preferred to call them, Parliaments, have been inserted continuously, as if they were the Statutes of one and the same Council. Matthew Paris has avoided this error in his Chronica Majora, vol. ii., p. 341, where he sets forth the laws established on 23 January 1236 under the title of "Statuta Regis "Henrici III. apud Meretonam, scilicet in crastino "Sancti Vincentii," and his text of the law concludes with the fifth paragraph enacting that usuries should not run against minors. To this, however, he has subjoined, as a kind of memorandum, that the Council discussed a proposal of the magnates, that they might be authorised to capture and confine in their own prisons any trespasser within their parks and vivaries, to which the King would not assent, so the law remained as it was.

Matthew Paris has further alluded to the legislation of 1236 in his Historia Anglorum, vol. ii., p. 387, Rolls edition, in which he states that after the coronation of Queen Eleanor (of Provence) in Westminster Abbey the King went down to the Priory of Merton, and re-summoned the magnates to meet him there to discuss a letter, which he had received from the Emperor Frederic II., requesting the King to send his brother Richard Duke of Cornwall to join him in attacking the King of France. But the King and the Barons resolved that the Duke of Cornwall, being at that time the sole heir to the Crown, was too young and too precious to be exposed to the risks of a campaign, more especially as it was uncertain whether the newly crowned Queen, who was very young (she had not yet completed her fourteenth year), would bear children. The Historian goes on to say "Diebus "etiam sub eisdem rex Henricus III., pro salute animæ "suæ et regni emendatione et ut dominus prolem sibi "concederet fortunatam, apud Meretonam quasdam "novas leges spiritu ductus justitiæ et pietatis con-"stituit, et constitutas per regnum suum inviolabiliter "jussit observari. Quæ in libro supplementorum vel "additamentorum plenius poterunt reperiri." Matthew Paris appears to have been present on occasion of the nuptials of Henry III., as he describes, in his Chronica Majora the details of the nuptial banquet with all the zest of an eye witness, and further he goes on to state an event, which furnished very good reason for the Court withdrawing from Westminster to Merton. The nuptials were celebrated on 20th January, and we find the Court transferred to Merton on the following 23rd January. An unusual inundation of the Thames appears to have surprised the Court on the new moon following the Coronation, accompanied by heavy rains. Amongst unusual events, "Matthew Paris writes, "The River Thames over-"flowed its accustomed banks, and entered the Great "Palace at Westminster and covered the floor of the hall

" to such a depth, that persons had to be carried about in " boats, and the cellars of the palace could not be pumped " dry." Unfortunately, however, the promise of Matthew Paris in his Historia Anglorum, that the text of the laws of Merton would be found in the Liber Additamentorum, has not been fulfilled. They are not, according to Sir Frederic Madden, the editor of the Historia Anglorum, in the Liber Additamentorum, but the substance of them he observes is given in two Manuscripts B. and C. (ed. Wats, p. 422), also in the Annals of Burton, p. 249, Rolls edition. The MSS. B. and C., to which Sir Frederic Madden calls attention, prove to be MSS. of the Chronica Majora of Matthew Paris, and as such merely contain the text, to which we have already referred as published in the Rolls edition of those Chronicles.

The Annals of Burton on the other hand have a continuation of articles, which are not found in the Chronica Majora, and which are dated Feb. 3, 21 Hen. III., whilst the preceding laws of Merton are dated 23 Jan. 20 Hen. III.. These later articles contain regulations respecting the forests, and the justice of the forest and the office of the King's bailiffs. Then come certain articles limiting the time within which a writ of right might be sued out, also the time within which writs concerning the death of an ancestor, writs of naifty, and writs of entry might be sued out, and finally an article defining the time within which a writ of novel disseysine might be sued out in these words, " Brevia novæ disseysinæ " non excedant transfretationem regis Henrici, qui " nunc est, in Britanniam, et vigorem habeant a tem- " pore predicto, et brevia prius impetrata procedant." " It will be observed that the reading of " Britanniam," in this paragraph differs from the reading of the corresponding paragraph in the Statutes of the Realm of 1810. Bracton, however, appears to have been familiar with the reading adopted in the Annals of Burton, which is also the reading of the Patent Rolls 21 Henry III.,

m. 10, and his writ of novel disseysine is limited to the King's last return from Britanny. On the other hand the limitation of the writ of novel disseysine, as subsequently provided by 3 Edw. I., ch. xxxix., is in identical terms with the reading of the Statutes of the Realm of 1810 "et qe les briefs de novel disseisine et " de purpartie, qest appelle nuper obiit, aient le terme " puis le primer passage le Roi Henri, pier le Roi " qore est, en Gascoigne."

Bracton twice makes mention of a Constitutio, which is apparently the second reissue of the Great Charter by Henry III. in 1217, and he alludes to it on the first occasion as the Statute of Liberty (Constitutio Libertatis), and on the second occasion merely as the Statute (Constitutio). As both these allusions occur in one and the same chapter (c. ix.) it is presumable that they refer to the same statute, being, as it were, *in pari materia*. The first allusion, however, is made to a judicial decision founded on the construction of the Constitutio, in which Bracton himself does not seem to concur. "Likewise" speaking of those persons who are not entitled to an assise of novel disseysine, he says "a person under reli- " gious vows (according to some) is not entitled, who has " been enfeoffed by some one who held in chief from " the King or another, unless the residue, which has " remained in the hands of the feoffors, is adequate to " the full service, on account of the Statute of Liberty." This appears to point to the thirty-ninth paragraph of the Charter of Henry III., which is in these words, "Nullus " liber homo de cetero det amplius alicui vel vendat " de terra sua, quam ut de residuo terræ suæ possit " sufficienter fieri domino feodi servitium ei debitum, " quod pertinet ad feodum suum." It may be presumed that in such a case the donation would have been held by the King's judges to be a void donation, and the donee, if disseysed by the lord of the soil, would have been held to have no title to claim recovery of seysine

The second allusion is in this manner: "Likewise an "assise of novel disseysine does not lie by reason of a "donation, as if a person has given so much of his "tenement in free alms, whereby the chief lord will "have lost his service, for this is contrary to the statute, "as appears from the Roll of the Pleas which follow the "King, in 23rd year of the reign of King Henry at "Cateshull, before William de Ralegh concerning Robert "de Toteshall and the Prior of Bricksete, concerning a "tenement in Rathford, there the assise fell through." "Likewise," Bracton goes on to say, "an assise does not "lie in the case in which a person has held from the "Lord the King in chief on condition of military service, "and such person has enfeoffed a person under religious "vows in free alms, or if he has held from someone else "than the King by a less service. And hence if the Lord "the King or another chief lord shall have forthwith "ejected the religious person, he shall not recover, as in "the preceding case before the same judge, unless he "has had time after the seysine." To this judgment, as delivered by William de Ralegh, Bracton suggests no objection, and Britton lays down the law in the same terms, where he states that a right of action to recover possession by an assise of novel disseysine does not appertain to persons in religion or others, who shall have purchased land of another's fee in mortmain, if they be ejected by the lords of the fee according to the ordinance of our statute (L. II., ch. xii. § 1).

The chapter of Bracton (ch. x.) in which he discusses the question against whom an assise of novel disseysine may be brought, and in what modes a person is liable for an assise, has been thought by some writers to throw light upon the time when Bracton completed his work. For instance, on folio 171b, he writes, "Likewise, "amongst other things, it is to be seen who is the "person who has ejected another, whether, for instance, "it has been a prince, to wit, from his power, or some

" one on his behalf and in his name, or a judge, who has " judged badly, or a private person. But if it be a prince " or a king, or some one who has no superior but the " lord, there will be no remedy against him by an assise ; " on the contrary, there will only be place for a supplica- " tion that he will correct and amend his own act, " which if he will not do, it must suffice for his punish- " ment that he wait the Lord the Avenger, who says, to " me Vengeance, I will repay ; unless there be some one " who says, that the corporation of the realm and the " baronage ought to do and may do this in the King's " court (nisi sit qui dieat quod universitas regni et " baronagium suum hoc facere debeat et possit in " curia ipsius regis)." This passage is thought to have been written sometime between the Parliament held in London in 1255 and the Parliament held in Oxford in 1258, in which the so-called Provisions of Oxford were established by the Barons, by which the regal authority was considerably controlled, and it has been considered by some that Bracton had in his mind the possible limitation of the royal prerogative, viz., that the King could be approached by the subject in a suit for redress only by way of petition. Bracton in subsequent portions of his work maintains the exemption of the King from the ordinary process of the courts. " Thus, he says, fol. 212, " Likewise a perambulation sometimes takes place be- " tween the lord the King and a claimant, if a dis- " seysine has been made by the bailliffs of the King in " the name of the King himself, and in which case, if " the disseysine be manifest, the pleasure of the King will " have to be waited for, that the assise shall proceed or " not ; " and, in fol. 382, he says, " that the King cannot " be called by a subject to warrant his title to a tene- " ment as a private person may be called, for he cannot " be summoned by a writ." Mr. Coxe, in commenting on these passages in Bracton, has made some observations which are very apposite to the moot question,

whether the King of England was ever suable in his own courts during Bracton's time, as certain passages in the year books of Edw. III. state that in the time of Henry III. and previously the King was suable as any other person in the King's courts, although it was otherwise ordained in the reign of Edward I. But records of the reign of King John show that before Magna Charta the King could not be sued, or at least he could prevent the trial of a suit against himself. Records, however, of that reign show that, whilst King John was under the subjection of the council established by Magna Charta, he was sued in several cases by persons, whom he had previously dispossessed of their lands without a judgment. On the other hand the great charters of Henry III. do not contain any provision subjecting the Crown to any control of a council analogous to that which was established in the reign of King John, or analogous to that which was forced upon Henry III. himself by the Barons at Oxford in 1258. It is possible, indeed, that the result of the Provisions of Oxford was to enable the subject to sue the Crown, and that this fact was in the view of one of the judges, who remarks in the reign of Edward III. that he had seen a process against Henry III. In the pacification between the King and the Barons, which was carried into effect by the Dictum of Kenilworth (51 H. III.), it was provided, that everyone should sue for justice in the King's court, and should answer in justice as had been usual before the late troubles; and from records in the subsequent Fine Rolls of 56 H. III. it appears that the only remedy for a widow for her dower, or for an heir entitled to restitution, in cases where land had been taken into the King's hands, was by petition, and that redress was accorded as of grace and not of right. Further, it deserves notice that, whilst Henry III. was a prisoner in the hands of Simon de Montfort, who governed in the King's place, the form of proceeding in such cases seems to have been by way of petition.

Bracton at all events seems to have no doubt that the Crown was not liable to an assise for a novel disseysine, as, immediately after citing the Statute of Liberty, Bracton goes on to say, "Likewise no person is entitled, who has "been disseysed by the lord the king or his bailiffs in his "name, unless the disseysine be manifest, in which case "the will of the lord the king is to be expected. But "if it be not manifest, because it is by chance a conten-"tion respecting the boundaries of fields, the pleasure of "the King has to be attended, that under his precept, "and if it so pleases him, there may be a perambulation, "and so the business be terminated," fol. 168 b.

The law, as stated by Bracton on the subject of the King not being liable to be called to warrant, seems to have undergone some change before Britton's time. Thus Britton, L. III., ch. xi., § 22, says, "if any tenant or "warrant shall say by way of response that he cannot "answer without us, and thereupon puts forward a "charter of us or some of our predecessors, the assise "nevertheless shall not be stayed. But if it passes for "the plaintiff, let judgment be deferred until the next "session, in case by the charter we may be bound to "warrant by virtue of some special words, although the "clause of warranty may not be therein expressed, and "in the meantime let our justices be consulted on the "subject. But if it be a charter of confirmation of "King Canute, or of any other who was not our "ancestor, or if the charter express that we have "granted as much as was in us, saving the rights of all "other parties, in that and the like cases we will not "have judgment delayed." Further, Britton goes on to say, L. III., ch. xxii., § 7, "Where the tenant says "that he cannot answer without us, if he produces a "charter whereby we are bound to warranty and ex-"change, the assise shall stand over, but not otherwise." On the other hand Britton states the law as to disseysines, where the King is interested in these terms: "Some-

" times it happens in this assise that the disseysors " shelter themselves by us, and say that they neither " have nor claim anything in the tenement, but whatso- " ever they did was done in our name, and that without " us the assise cannot pass, nor the fact be brought to " judgment without prejudice to us, in which case we " will not that under such pretext the assise shall stand " over; but if the disseysine be clear and manifest, let " it be adjudged for the plaintiff, and let the common " law take its course against the tenant or against any " other person, and if any doubt be perceived, let judg- " ment be respited to another day, and let the pro- " ceedings in the meantime be laid before us, so that " judgment may be ordained by our advice."

A friendly criticism in "Notes and Queries" (July 5, 1879) has invited the Editor's attention to his translation of a passage in Vol. 1, p. 209, as likely to mislead the reader. Bracton writes: "Et quoniam hujusmodi " scripturæ non esset fides adhibenda nisi *signum* in- " tervenerit, quod talis donatio et scriptura a consci- " entia et voluntate donatoris emanaret, ideo in testi- " monium et approbationem rei gestæ apponit donator " *signum*, adjiciendo in charta donationis clausulam " istam quod ut ratum sit et firmum, &c. vel sic, in " cujus rei testimonium huic scripto sigillum meum " apposui." The Editor has translated the above passage: "And since faith is not to be given to a writing of " this kind unless a signature intervenes [to show] that " such a donation and writing have emanated from the " conscience and intention of the donor, therefore in " testimony and approval of the transaction the donor " affixes a signature, adding in the charter of donation " this clause, 'which that it may be ratified and be " 'firm,' &c., or thus, 'in testimony of which thing I " 'have affixed my seal to this writing.'"

It has been suggested in "Notes and Queries" that the term "signature" is in the above passage an erroneous

translation of the Latin word "signum," and that the Editor ought to have used the term "seal." There is considerable weight in the criticism, and perhaps the term "sign" would have been a safer translation, but we should have hesitated to use the term "seal" for this reason. Bracton in the above passage seems to have had in his mind two different modes of attestation, as he has given two forms, one in general terms, whilst in the other he has introduced the word "seal" (sigillum). It was in consequence of this special use of the term "sigillum" in the alternative form of attestation that the Editor thought it advisable to translate "signum" by the term "signature" as a generic term, which might include a mark, in fact the Anglo-Saxon cross, equally as the Norman seal. The word signature is used in law books to signify attestation by a mark, and not necessarily the subscription of a name. In fact in the more ancient charters "signavi" will be found to be used for a manual mark in contradistinction from "sub-"scripsi," when the name was written in full. For instance, in the Registrum Malmesburiense, recently published in the Rolls series, being the last editorial work of the late Rev. J. S. Brewer, M.A., there are a series of charters of the reign of William the Conqueror illustrating the use of the verb "signare" as distinguished both from "subscribere" and from "sigillare," in which it appears that "signare" was used to signify a mark howsoever made by the hand, and not impressed upon wax. Thus a charter granted by William I. to the Abbot of Maldon is thus attested, p. 326:—

"Ego Willelmus, rex Anglorum, hoc donum confir-"mavi et sigillo meo confirmavi.

"Ego Matilda regina signavi.

"Ego Lanfrancus, archiepiscopus Cant., subscripsi."

In the next following charter, which is a grant of land to the monastery of Maldon, we find the following attestations, p. 327:—

" Ego Willelmus, rex Anglorum, hoc donum firmavi
" et manu mea signavi.
" Signum Matildæ reginæ, quæ hoc donum fecit.
" Signum Lanfranci, archiepiscopi Cant."

We cite these two charters as illustrations of the original use of the word "signavi" in a different sense from that of sealing or subscribing. If we go further back in the same volume to what purport to be charters of the Anglo-Saxon kings, we find the attestations of the kings themselves are generally made by a manual mark expressed as "signum manus," whilst those of the bishops are made by the writing of their names and expressed as "subscriptio." A further distinction seems to have been made sometimes, when the mark of the cross was made with the hand from what was done when it was impressed by a stamp; in the former case "signum" was used, in the latter "sigillum." Thus a charter of Æthelwfus, King of the West Saxons, A.D. 880, is thus attested: "Ego Æthelwfus rex signo
" crucis hoc donum meum confirmavi Domino Deo
" meo;" whilst a charter of King Athelstan, A.D. 931, is thus attested: "Ego Athelstan, rex totius Britanniæ,
" præfatam donationem sigillo sanctæ crucis confir-
" mavi." It would appear that the former of these attestations was made by a manual cross, whilst in the latter case the cross was impressed by a seal-stamp.

Seals of wax are believed to have been introduced into England with the Conquest, and in the time of Bracton they were no doubt in use fixed to a label of parchment, or to a silk cord fastened to the fold at the bottom of the charter, or to a slip of parchment cut from the bottom of the deed and hanging from it, to which fashion Bracton alludes, when he says that no faith is to be given to a patent and open writ, if the seal is altogether fractured or the tail snapped (fol. 189 b). But although wax seals were in general use in Bracton's time, we are not disposed to think that a deed was invalid

where a donor attested his grant with a mark or cross. In the next following reign of Edward I. the seal was in such universal use, that Britton does not treat of the forgery of handwriting, but only of the forgery of seals; and in speaking of the execution of charters he says after the deed has been prepared, "let some of the neighbours who are freeholders be called as witnesses, in whose presence the charter should be read and sealed, and the names of the witnesses should be written in the charter. It would also be a good precaution," he goes on to say, "to procure the seals of the witnesses to be affixed together with the seal of the lord of the fee, or in the presence of the parties to have the charter enrolled in a court of record. And, although the witnesses be not called, it is sufficient if the deed be afterwards recorded and acknowledged before them. If the feoffor has no seal of his own, a borrowed seal is sufficient." (L. II., ch. viii., § 10.) Bracton to the same effect observes it matters not whether the charter be signed with one's own or another's seal, "Utrum proprio vel alieno sigillo sit signata, cum semel a donatore coram testibus ad hoc vocatis recognita et concessa fuerit. Si autem testes præsentes non fuerint, nec talis solemnitas adhibita, si de signo et charta oriatur dubitatio, si cum testes fuerint requisiti, dicant se nil inde scire, ita deficere possit charta, quamvis vera sit et bona propter defectum probationis." Further, Bracton goes on to say, "Item non sufficit chartam esse factam et signatam, nisi probetur donationem esse perfectam," and further, that delivery has followed.

There can be no doubt that Bracton in this passage uses the term "signata" in a generic sense, which would be satisfied by a seal, or, as we should prefer to say, by a stamp made on the surface of the deed with a signet, for Bracton treats of a case where a donation has been made and seysine given by the donor during his

lifetime to the donee, and after the death of the donor, a deed of donation has been obtained by the donee, on which the donor's sign has been impressed, in which case, to use Bracton's words, "licet signum cognitum "fuerit, nihilominus tenebit donatio et charta nulla "erit."

The term "writ" which had survived the Norman Conquest, and has re-ejected since Bracton's time the Norman "breve," was no doubt in use in the Anglo-Saxon period under the form of "ge-write," when it was desired to secure a better judge in the county court than the sheriff, or when it was necessary for the King to compel the sheriff to do justice to a suitor in the county court. After the Conquest, when the sheriff's jurisdiction came to be limited, the King's writ was in use to give the sheriffs jurisdiction in cases which they could not try *ex officio*, and in which cases a writ of *justicies* was issued to the sheriff. This writ was still in use in Bracton's time, but in the majority of cases, after the county court had ceased to be the *Curia Regis*, a practice since the reign of Henry I. seems to have grown up in all cases, where the cause in action was above the value of forty shillings, or where sufficient reason could be shown otherwise, for the suitor to sue out a King's writ to bring the case into the *Curia Regis*, wherever that might happen to be held *coram rege*, or into the King's court when held before the justices of eyre, and this was the more necessary in cases tried on the circuit of the judges, inasmuch as the sheriff could only exercise his authority *ex officio*, when the cause of action arose within his county. The Norman *breve*, like the Saxon *writ*, was in Bracton's time still drawn up in writing, but it had the additional guarantee of the King's seal being attached to it, and Bracton states that amongst the exceptions that might be taken against the writ, was an exception against the handwriting, if it should not be in the style of the King's chancery, and against

the seal if it should be an adulterine seal, and in the case of an open writ, if the seal should be fractured or the tail of it snapped. These exceptions would be obvious to an unlettered people, but it is rather surprising to find that an exception could be taken in Bracton's time successfully against a writ on the ground of an error in the spelling of the name of the defendant, even if such error only was to the extent of a wrong letter in the name of the defendant. Thus our author, after stating that an assise ought not to proceed, if there were in the King's writ an error in the name, as if for "Henry" there is inserted in the writ "William," and the converse. Likewise, if there has been an error in the surname, as if it is written "Hughbert Robertson," when it ought to be written "Hughbert Walterson." Likewise it will be the same, if there be an error in the name of the vill whence a person has his origin, as if instead "of London," a person is described in the writ as "of Winchester." He goes on to say, "Likewise if there be an error in a "syllable, as if one should name another Henry de "Brochetone, when he ought to be named Henry de "Bracton. Likewise the same will apply to a letter, as "if a person has erred in naming a person Henry de "Brachthon, when he ought to name him Henry de "Bracton, and all these things can be proved by ex-"ample," fol. 188 b. The pen of the Great Justiciary has here removed the *incognito*, which he has preserved at the commencement of his work, when he describes himself simply as "Ego talis animum erexi," and which is the reading of the earliest MSS. Like the great historical painters of ancient days he is content to perpetuate his own likeness in the features of an attendant on the hero of the scene. Yet, strange to say, it would seem that, although this literal accuracy was required on the part of the lord chancellor's scribe as regards the identity of the parties to be tried by the judge, it was not thought equally necessary as regards the identity of

the judge himself, for there are records of writs which are addressed to Henricus de Bratton, and of other writs which are addressed to Henricus de Bracton. Thus in the Placitorum Abbreviatio, f. 138, there is an entry in 36 H. III. (anno 1252) et super hoc lectum est breve de justiciaria Domino H. de Bratton directum, per quod Dominus Rex assignavit ipsum justiciarium ad capiendam assisam mortis antecessoris, &c.; whilst in the Nova Fœdera, i. 320, there is a record of an assise held in 39 H. III. (anno 1255) coram justitiariis H. de Bathonia, Henrico de Bracton, &c., which is about the very period at which Bracton may be with good reason believed to have composed his great work. It may not seem very strange, that in the reign of Edward I., the name of the great justiciary, who was then dead, should have been written, as Selden ad Fletam, c. 2, § 2, remarks, in various ways, such as Breton, Bratton, Bracton, Britton, Bryckton, and Lord Chancellor Campbell, in his Lives of the Lord Chancellors, vol. i., p. 160, after enumerating several of the above names, has added, "and some have "doubted whether all these names are not imaginary." Lord Campbell, however, does not join the ranks of the disbelievers in the personality of Bracton. Whether Homer was a person or an impersonation will always be a subject, upon which the most enthusiastic admirers of the *Iliad* may differ, but that there was a great justiciary in the reign of Henry III. who bore the name of Henricus de Bracton cannot be a reasonable matter of dispute, nor that the author of the Treatise on the Laws and Customs of England was conversant with his personal identity.

We have already, in the introduction to the second volume traced the ecclesiastical perferment held by the great justiciary, and as far as our researches have gone his highest advancement as a dignitary of the church appears to have been to the office of Chancellor in Exeter Cathedral, on which occasion he vacated his office of Archdeacon of Barnstaple. The language, however, of

Bracton himself requires some examination, as it seems at first sight to suggest that he attained to the dignity of dean of some cathedral or collegiate church. Thus, in the passage already cited, folio 188 b., he has added a further illustration of a fatal clerical error in a writ of novel disseysine, namely, where the plaintiff has been mis-described as regards his name of dignity. "Like-"wise," he says, "the same will be" (that is to say, an assise will not proceed) "if the name and surname are "correct, but there is an error in the description of the "dignity, as if it be said in the writ, Henry de Bracton, "the precentor, has made complaint instead of Henry "de Bracton, the dean, and so the writ fails." We have thought it desirable to follow up the clue which this passage might at first sight be supposed to furnish to the reader in directing his researches beyond the limits of the diocese of Exeter, but we have failed hitherto to find any trace of the name of Henricus de Bracton amongst the deans of the English or Welsh cathedral or collegiate churches. Le Neve, in his Fasti Ecclesiæ Anglicanæ, has supplied a calendar of the principal ecclesiastical dignitaries in England and Wales from the earliest times to the year 1715, which has been corrected and continued down to 1854 by the late Sir Thomas Duffus Hardy, Deputy Keeper of the Public Records. It has not escaped Le Neve's observation that Henricus de Bracton was Archdeacon of Barnstaple and afterwards Chancellor of the cathedral of Exeter, but no traces of any such name is to be found in the list of deans, and we are disposed to think that the author of the treatise on the Laws and Customs of England intended to throw the reader off the true scent as to his personality, when he said that Henry de Bracton would be wrongly described as a precentor, when he was a dean. There is also a noteworthy difference in the terms in which the author suggests the possibility of a clerical error in the name of dignity. After reciting the previous errors in respect of the name and the surname of the plaintiff, he

adds the words "et omnia ista probari possunt per " exempla," but he does vouch an example to be forthcoming of the misdescription of Henricus de Bracton as a precentor, when he was a dean.

Mention has already been made of the Constitution of Merton on the subject of coarctation of common, which Bracton has set forth in the present volume, fol. 227, as drawn up by William de Ralegh then justiciary. There is no doubt of its identity with one of the paragraphs of the *fasciculus* of laws, which has been published amongst the Statutes of the Realm by the Record Commissioners, in 1810, under the title of the Provisions of Merton. That title the Commissioners seem to have borrowed from MS. Cotton, Claudius D. ii., fol. 142, in the British Museum, which purports to have been copied from the Great Roll of the Statutes in the Tower of London. It has also been observed that it is doubtful whether certain paragraphs of this *fasciculus* of laws have any claim to rank amongst the Provisions of Merton, which were submitted to and approved by King Henry III. at the court held before him in the Parliament Chamber of the Priory of Merton in Surrey in 20 H. III. The grounds for disputing the claim of all but the first five paragraphs of this *fasciculus* of laws to be received as the Provisions of Merton are threefold. In the first place, the provisions of Merton having been approved by the King on 23 January, 20 H. III., were embodied in a royal writ, which was sent forth to the sheriffs throughout England on the 30 January next following, directing the new Constitution to be read in the full county court and to be firmly kept. This writ is preserved in the Close Rolls of 20 Henry III. m. 18 d., and it contains only the first five paragraphs of the *fasciculus* published by the Record Commissioners. In the second place, Matthew Paris, the monk of St. Albans, and a contemporary of Henry III., who is indebted to the King himself for much which he narrates in his Chronica Majora, sets out the text of the laws of Merton

as established on January 23, 20 Henry III., and the text so set out by him contains only the first five paragraphs of the *fasciculus*. In the third place, the author of the Annals of Burton, an early work of the next following century, gives as the laws of Merton established on 23rd January, 20 Henry III., only the first five paragraphs of the *fasciculus*, and although he appends to them certain other paragraphs of the *fasciculus*, the recital at the commencement of the first of these latter paragraphs announces them to be laws established on the 5th February, 21 H. III.; but even the additional laws of this latter date do not comprise all the paragraphs embodied in the *fasciculus* published by the Record Commissioners. Amongst the still later paragraphs of the *fasciculus*, the ninth paragraph of the Latin text is a law of some historical curiosity, as marking an epoch in the legal practice of the English courts, being the most ancient legislative Act in which mention is made of the office of the "attorney," who was altogether unknown under that title to Glanville, but is frequently mentioned by Bracton. The paragraph in question is in these words, "Provisum insuper, quod "quilibet liber homo, qui sectam debet ad comitatum, "trithingum, hundredum et wapentachium, vel ad "curiam domini sui, libere possit facere attornatum "suum ad sectas illas pro eo faciendas." Now neither the Chronica Majora of Matthew Paris nor the Annals of Burton afford to us any clue to discover how or when the provision contained in this paragraph became law, but it has been admitted, probably in virtue of the company in which it is found, into the Revised Statute Book of 1870, and is accordingly entitled to be received as one of the provisions of Merton made in 20 Henry III. and as law at the present time.

There are many good reasons for admitting into the Revised Statute Book of 1870 the first five paragraphs of the *fasciculus* which contains the Constitutio de Merton

of Bracton on the subject of the coaretation of common, amongst which the reason of most authority is found in the statutory recognition of the King's court held at Merton on 23 January, 20 Henry III., as a parliament of the realm. This recognition is found in the preamble of the statute of 3 & 4 Edward VI., ch. iii., entitled, "An "Act concerning the improvement of common and waste "ground," and in which the entire text of Bracton's Constitution is recited as having been made in a parliament held at Merton in 20 Henry III. Upon the assumption of such a fact the four other paragraphs would also be rightly held to have the force of law until repealed. But the subsequent paragraphs, which are recorded in the Annals of Burton, have obtained no similar recognition, unless we except the paragraph for the limitation of writs of novel disseysine, which is virtually re-enacted in 3 Edward I., ch. xxxix.

We had at one time entertained a hope that the Great Roll of the Statutes formerly kept in the Tower of London, from which MS. Cotton, Claudius D. ii., f. 142, purports to have been transcribed, might have afforded to us some help to determine the question whether the paragraph on the subject of attorneys is coeval with the preceding paragraphs of the *fasciculus* or not. The Parliamentary Rolls, of which six are now in the Public Record Office, which were formerly preserved in the Tower of London, consist of a series of membranes, which have been sewn together so as to form in each instance a long roll, and where two or more paragraphs are written on one and the same membrane in the same handwriting, the presumption is that they are laws of one and the same year. Unfortunately there is no roll found amongst the existing Tower Rolls, which corresponds in its contents with the "Magnus Rotulus" from which Sir Robert Cotton's MS., Claudius D. ii., f. 142, purports to have been transcribed.

How or when that "Magnus Rotulus" disappeared, if it has entirely disappeared, is not recorded in the Office

of the Rolls, but the Roll, which now passes muster as the Great Roll of the Statutes formerly preserved in the Tower of London, does not go further back than the Statute of Gloucester, 6 Edward I., and is continued forward to 50 Edward III., whereas the "Magnus Rotulus" from which MS. Cotton, Claudius D. ii., f. 142, purports to have been transcribed, went back to the Great Charter of King Henry III., as recited and confirmed by 25 Edward I. Further the Cotton MS. terminates with a statute of 21 Edward III., entitled Ragman, "Explicit "statutum quod vocatur Ragman."

We have endeavoured by an examination of the earliest printed editions of the English Statutes to ascertain when the last collation was made of the text of the Statute Roll, which Sir Robert Cotton describes as "the Great Roll in the Archives of the Tower." This description of the Roll, from which MS. Claudius D. ii., f. 142, purports to have been transcribed, is given by Sir Robert Cotton himself in a legend in his own handwriting written across the face of the MS. on the top of the first page, and before the commencement of the text. The words of the legend are as follows: "Rotulus Sta-"tutorum ab Henr. III. ad ann. 21 Edwardi III. ex "magno rotulo in Archivis Turris London. tran-"scriptus et examinatus. Ro. Cotton."

The handwriting of the MS. itself is of the reign of Henry VI., according to the opinion of competent experts, and at the end of each paragraph in the same handwriting are the words "examinatus per rotulum." It would thus appear from the character of the handwriting of the MS., and of the voucher at the end of each paragraph, that it furnishes evidence of the existence of the Magnus Rotulus in the Tower of London in the reign of Henry VI., but not of its existence at any later period, and there is no memorandum in any part of the MS. in Sir Robert Cotton's writing which shows that it was collated by him or by his direction with the

original Roll, of which it purports to be a transcript. On the other hand none of the extant editions of the English Statutes appear to have been printed from a Tower Roll of the Statutes identical with the Magnus Rotulus from which MS. Cotton, Claudius D. ii., f. 142, purports to have been transcribed. Pynson's small edition of the "Statuta Antiqua," which was printed in 1508, and is the earliest known printed book of those Statutes, and Berthelet's folio edition of 1543, which was a reproduction of Pynson's text, seem neither of them to have been printed from a text identical with the Magnus Rotulus from which MS. Cotton, Claudius D. ii., f. 142, purports to have been transcribed. Further, Pulton's folio edition of 1618, which purports to have been corrected from the Records of the Tower, under the special authority of the Lord Chancellor, and with the approbation of the King himself, commences with the same Statutes, viz., the 25 and 28 Edward I. confirming the Great Charter and the Forest Charter of 9 Henry III., which are the opening Statutes of MS. Cotton, Claudius D. ii., f. 142, but it omits an important legislative act which is recorded in that MS. of A.D. 1254, when the King's seal was put to the Charters in Westminster Hall; on the other hand, it comprises several statutes of Henry III. which are not in the Cotton transcript. All these editions of the Statutes must have been known to Sir Robert Cotton, as Pulton was in frequent communication with him. After Sir Robert's death, which took place in 1631, came the Protectorate, and it is not until a century had elapsed after the death of Sir Robert Cotton that a new edition of the Statutes was published by Serjeant Hawkins in 1734, which purports to have been collated with the original roll of the Statutes in the Tower, but Serjeant Hawkins states that the roll which he collated commenced with the Statute of Gloucester, 6 Edward I., "the Statutes between Magna Charta and the Statute "of Gloucester being omitted in that Roll." It is this

Roll, which in the present day is entitled "the Great Roll of the Tower," and is so designated in the introduction to the Statutes of the Realm, published by the Record Commissioners in 1810, and it is suggested in a note to that introduction that certain small holes in the edge of the membrane, on which the Statute of Gloucester is written, indicate that there must have been formerly other membranes which have been detached from it. On this hypothesis it is possible that this roll may have been the Magnus Rotulus to which Sir Robert Cotton's legend refers, but in that case we must suppose that MS. Claudius D. ii. contains only a selection of the Statutes contained in the Great Roll, and that the words with which the legend commence, "Rotulus Statutorum," are to be interpreted as meaning "a Roll of Statutes," and not "the Roll of the Statutes." But this is an interpretation which we should be reluctant to accept, unless further examination of the evidence should constrain us to do so. That the provision as to attorneys was held to be part of the Statute of Merton in the reign of Edward I. is shown by a passage in the Mirroir des Justices, in which the Chamberlain of the City of London discusses the meaning of it as one of the articles of that statute.

"Le point de Attornies faire en suits al hundreds
" est entendable encest manner que tout puisse suiter
" faire attornie pur luy per cest estatut a salver son
" default, pur ceo que ne poit nul judgment etre ren-
" due per attorne ne nulle femme est nome en cest
" estatute pur ceo quod nul judgment est rendable
" pur femme."

There is thus no difficulty in supposing that the law authorising the employment of attorneys by that name in the county court belongs to the group of Statutes, which passed at a very early period under the name of the Provisions of Merton. The office of Attornatus under that name appears to have been recognised in England

early in the reign of Henry III., and during the time when Hubert de Burgh was Chief Justiciary (1215–1232). The "Attornatus" under that name was unknown to Glanville, in whose time "Responsalis" only had obtained admission into the King's Court, his name being borrowed from the Novellæ of Justinian. The recognition of the responsalis in the King's Court, as distinct from the essoniator, was a step in advance to facilitate the administration of justice.

The "Essoniator" could only make excuses for the non-appearance of the defendant, the "responsalis," on the other hand, was the representative of the defendant in the special suit, and could bind him to obey the judgment of the Court. He was sent by the defendant, to use Glanville's language, ad lucrandum vel perdendum pro eo in loco suo (L. I. c. 12), and if the defendant after three essoins did not send a "responsalis" upon a further day named by the Court, judgment went against him by default. Glanville has dedicated his eleventh book to the discussion of the duties of a "responsalis;" he speaks of him as exercising a procuration on behalf of the suitor, and states that it was customary for the suitor to appoint a "responsalis," if he was minded so to do, before the King's justiciaries residing in the Bench (coram Justiciariis Domini Regis in Banco residentibus). Further, it would appear that if he wished to appear by a "responsalis" in the county court he had to sue out a King's writ to that effect, for the King's judges would not otherwise allow a person to appear by a "responsalis," seeing that the words of the King's writ of summons commanded the defendant to appear, and the judges held that the writ would not be satisfied unless the defendant appeared before them in his proper person. Hence the importance of the Statute of Henry III., authorising attorneys to appear in county courts, as it rendered it unnecessary for suitors in those courts to sue out a writ of "Dedimus potestatem de Attornato

" faciendo." But how and when came the "attorney" to be recognised in the King's courts, as his powers were larger than those of the responsalis? Bracton, for instance, describes, in chapter xxxii. of the present treatise, folio 212 b., certain limitations of the mandate of the responsalis, whom he designates by the more familiar title of "ballivus," as used in the writ of novel disseysine: "Put under bail and good sureties such a one or " his bailiff, if he be not himself found," and Bracton goes on to say, "and it is to be known that a bailiff " cannot do everything which his lord can do," and further, after enumerating certain things which a "responsalis" might not do, the text is continued "but " an attorney may do all these things." It is not, however an easy question to decide whether the office of the "Attornatus" was like the Great Assise, a benignant concession of the English Crown to the necessities of the suitor, or whether it was a foreign institution having been first introduced into Normandy. The word is a corrupt Latinism coined by a feudal legist, and is apparently of that hybrid origin, which it is convenient to describe as Anglo-Norman. It is derived from the word "attor- " nare," Anglice, "to attourn," which signified originally the process whereby, when a lord conveyed his manor or seignory to a third party, he attourned or turned over to him his tenants or serfs. If we could be certain of the time when the Coustumier di Normandie was first compiled, we might have solid ground for asserting that the word is of Norman origin, and was introduced into England from Normandy, as the Coustumier de Normandie, after treating of Pledeurs and Conteurs in chapters lxiii. and lxiv., proceeds in chapter lxv. to treat of attorneys in these words:

" Attourné est cil qui est attourné par devant la jus- " tice pour aulcun en eschiquier ou en assise, ou il y a " record à poursuyr ou à defendre sa querelle et sa " droicture."

Count Beugnot, in his introduction to the Assises of La Cour des Bourgeois, being the second division of his great work on "Les Assises de Jérusalem," published at the Imprimerie Royale in Paris in 1841, assigns the date of 1180 to the ancient "Coustumier de Normandie." If this date be correct, which is earlier than the usual date assigned to that work, it would make the collection of Norman customs to be coeval with the work of Glanville, and in that assumption there would be no difficulty in supposing that the office and the title of attorney was imported into England from Normandy. This importation would contribute to a still more complete administration of justice in England, inasmuch as the mandate of the attorney was more extensive than that of the "responsalis," and his fuller power of representing his principal would enable the Courts to deal more thoroughly with the merits of each case as it came before them. On this supposition the jurisprudence of the Normans was in advance of the jurisprudence of the Franks, for Pierre de Fontaines and Philippe de Beaumanoir, the earliest expounders of the ancient customary laws of the Franks, make no allusion to the mandate of the attorney, but simply speak of "procureurs," who might act for the defendant, but not for the plaintiff.

Pierre de Fontaines is supposed to have written his famous work, entitled "Le Conseil de Pierre de Fontaines" about the year 1253, and Philippe de Beaumanoir to have composed his equally famous "Coutumes de Beauvoisis" in 1283. It has been usual hitherto to attribute the ancient "Coutume de Normandie" to Pierre de Fontaines or to Robert le Norman, and to suppose it to have been compiled in the middle of the thirteenth century, in which case it would not have been the channel through which the office of attorney was imported into England, that office, as already mentioned, being known in England in the early part of the reign of Henry III., if not as early as in the reign of King John.

There can be no doubt that the Statute of Henry III., whatever may be its precise date, did not create the office of attorney. Sir Anthony Fitzherbert (anno 1581) in his treatise entitled "La Nouvelle Natura Brevium," a work of the highest authority, says, in treating of the writ of "Dedimus potestatem," "it seemeth that the "King by his prerogative and before the statutes might "give a warrant to a man to make attorney in every "action or suit, and that as well unto the demandant "or tenant, as unto the plaintiff or defendant, and that "he might direct his writs or letters to the judges of "the courts, commanding them to attend and receive "such persons by their attorneys, and that the judges "are bound to receive the same." This is in full accordance with the language in which Glanville informs us that a party in a suit might appoint a responsalis before the justiciaries in the Curia Regis to appear for him, "ad lucrandum vel perdendum," either in the Curia Regis or in any other court. That the office of "the attorney" acquired a rapid increase of authority during the reign of Henry III. will be apparent by a comparison of the chapter in Britton on attorneys (l. vi. ch. x.) with the statement in Bracton already referred to as to the limitation of the functions of a bailiff (folio 212 b.). There is no reason, however, to suppose, although general attorneys had come to be appointed by the Lord Chancellor under Letters Patent of the Crown in the reign of Henry III., and such attorneys could act in all pleas as fully as if they had special letters of attorney from a party, that the Crown itself had any attorney-general in that reign. The earliest mention of a permanent attorney of the Crown occurs in the seventh year of King Edward I. Such is the statement of a Government official in a letter addressed to Sir James Marriott at the time when he was King's Advocate General, which has been printed by Mr. W. Forsyth, Q.C., in his "Cases and Opinions on Constitutional Law,"

p. 91.[1] The office of the King's solicitor on the other hand was not created before 1 Edward IV., when a solicitor-general for the Crown was appointed, and the King's permanent attorney had at that time the additional title of "general" annexed to his office. By a strange irony of fate the time-honoured title of attorney has become disparaged in the present day, and has been ordered by Act of Parliament to be henceforth discarded for that of solicitor. But the office of solicitor appears to have been in its origin of a mean character as compared with that of the attorney, and its functions are described in Dr. Cowel's Law Dictionary in terms, which would not have warranted the expectation at that time, that the title of solicitor would have displaced within a century and a half after its publication (anno 1728) the more dignified title of attorney. An explanation of this fact may possibly be sought for in the condescension of Parliament to the popular belief that the solicitor is more conversant with the administration of equity than the attorney, and that in a scheme for the better administration of justice, which provides that whenever law and equity are in conflict, equity shall prevail, the solicitor's title is more appropriate to the practitioner than the title of attorney, and is more full of promise to the ear of the suitor.

The remaining paragraphs of the Provisions of Merton will be discussed hereafter in connexion with the passages of Bracton's text, which have a bearing on them or in which they are noticed. Such passages occur in f. 253 b., f. 373, and f. 416 b. The last of these passages throws light on the method of making laws before the Commonalty of the land were summoned to Parliament,

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[1] A copy of this letter is preserved in a manuscript Letter Book of Sir James Marriott's in the possession of the Editor. There is no date to it, but the writer signs himself J. Stainsby.

and illustrates the practice before that time of accepting as law the judgments of the Curia Regis, equally as the resolutions of the bishops and barons assembled in the presence of the King in Council.

T. T.

Temple, 1879.

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[1] "De recordo" is erroneously printed in the editions of 1569 and 1640.

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HENRICI DE BRACTON

DE

LEGIBUS ET CONSUETUDINIBUS ANGLIÆ.

HENRICUS DE BRACTON

ON THE

LAWS AND CUSTOMS OF ENGLAND.

L 451. Wt. B 52. A

HENRICI DE BRACTON

DE

LEGIBUS & CONSUETUDINIBUS ANGLIÆ

LIBER QUARTUS:

QUI DIVIDITUR IN SEPTEM TRACTATUS, QUORUM PRIMUS EST DE ASSISIS NOVÆ DISSEYSINÆ.[1]

Cap. I.

1. De divisione possessionum.

Dictum est suprà de actionibus criminalibus, & injuriarum quæ personales sunt, & pertinent ad coronam domini regis. Nunc autem dicendum est de actionibus civilibus. Et hujusmodi quædam sunt reales, & quædā sunt personales, sed primò de realibus actionibus dicatur. Et est rerū possessio, & est ꝑprietas, & primò dicenđ est de possessione quā de ꝑprietate ratione supradicta. Et sciendđ ꝙ possessionum, quædam nuda pedū positio, quæ dicitur intrusio, & dicitur nuda, eò
f. 160. quòd non vallatur aliquo vestimento, & minimum habet possessionis & omnino nihil juris, & in parte habet naturam cū disseysina et in quibusđ sunt dissimiles, quia ubicunq; est disseysina, ibi quodammodo est intrusio, quantum ad disseysitorem, sed nō è contrario,

[1] In MS. Rawlinson c. 159 there is here no division of Books. In MS. Rawlinson c. 160 there is a division with this title, "Incipit "liber quartus de assisis, qui divi- "ditur in septem tractatus. Quor- "um primus est de assisa nove "disseisine. Qui incipit hic." In MS. Godbold there is no division, and the text is continued "De ac- "tionibus civilibus"; but the text breaks off at the end of Chapter II., and a new book commences with the title, "Dictum est supra qualiter "possessio acquisita ex quacunque "causa acquisitionis de voluntate "possessoris ad alium transferatur."

THE FOURTH BOOK

OF

HENRICUS DE BRACTON

ON THE

LAWS AND CUSTOMS OF ENGLAND:

WHICH IS DIVIDED INTO SEVEN TREATISES, OF WHICH THE FIRST IS ON ASSISES OF NOVEL DISSEYSINE.

Chapter I.

We have spoken above concerning criminal actions, and injuries which are personal, and which pertain to the crown of the king. We must now speak of civil actions. And of this kind some are real, and some are personal, but let us first speak of real actions. And there is the possession of things, and there is the property of things, and first let us speak of possession rather than of property for the reason above mentioned. And it is to be known that of possessions one kind is the bare placing of the feet, which is called intrusion, and it is called bare because it is not fenced with any clothing, and has the least amount of possession and altogether no right, and in part it has the same nature with disseysine, and in some things they are unlike, because wherever there is disseysine, there in some manner is intrusion, as regards the disseysor, but not the converse, because wherever

1. Of the division of possessions.

f. 160.

quia ubicunq; est intrusio, ibi non est disseysina propter vacuam possessionem, & in utroq; casu possessio est nuda, donec ex tempore et seysina pacifica acquiratur vestimentum. Est et alia possessio, quæ parū habet possessionis et nihil juris, sicut illa quæ precaria est, et clandestina, sicut violenta, et talis ex tempore nunquā sibi vestimentum acquirit. Est et alia, quæ aliquid possessionis habet et nihil juris, sicut illa quæ conceditur ad terminū annoř, ubi nihil exigi poterit nisi usus fructus. Est etiam quædā quæ multum habet possessionis et nihil juris, sicut illa quā quis habet ad vitam tantùm, ex causa dotis, vel donationis, vel alia quacunq; causa. Est etiam quædam possessio quæ plus habet possessionis et multum juris, sicut illa, ubi quis habet liberū tenementum et feodum sibi et hæredibus suis. Est etiam quædam, quæ plurimum habet possessionis et plurimum juris, sicut est illa, in qua quis habet liberum tenementum, feodū et ꝑprietatem. Et cùm talis habet plurimum possessionis, et plurimum juris, alius tamen in eodem habere poterit jus majus.

L. II. c. xvii., § 3.

Cap. II.

1. De possessione, quæ nuda est, vel dicitur.

Primò verò dicenď est de illa, quæ nuda est omnino et sine aliquo vestimento, quæ dicitur intrusio, et sic de aliis consequētèr dicatur ꝑ ordinē. Videndum igitur quid sit intrusio, et sciendū ꝙ intrusio est, ubi quis (cui nullū jus competit in re nec scintilla juris) possessionē vacuā ingreditur, quę nec corpore nec animo possidetur, sicut hæreditatem jacentem antequam adita fuerit ab hærede, vel saltem à dño capitali ratione custodiæ, vel ratione eschaetæ, si fortè hæredes non existant, vel si post mortem alicujus, ꝑ finē factum, vel per modum donationis, ubi successio

there is intrusion, there is not disseysine on account of the vacant possession, and in each case the possession is bare, until clothing has been acquired by time and peaceable seysine. There is likewise another possession, which has little possession and no right, such as that which is precarious and clandestine, such as is violent, and such possession never acquires for itself clothing. There is another, which has something of possession and no right, such as that which is granted for a term of years, where nothing can be exacted except the usufruct. There is also some possession, which has much possession and no right, like that which a person has for life only on account of dower, or on account of donation or for some other reason. There is also a certain possession, which has more possession and much right, such as those things, where a person has a free tenement and the fee for himself and his heirs. There is also a certain possession, which has the most possession and the most right, such as that, in which a person has a free tenement and the fee and the property. And when such a person has the most possession and the most right, another person however may have a greater right in the same thing.

Chapter II.

1. Of possession, which is bare or is so called.

But we must first of all speak of possession, which is bare and without any vesture, which is called intrusion, and so let us speak of the others in order. We must see therefore what is intrusion, and it is to be known that intrusion is, when a person, who has no right in a thing nor even a spark of right, enters into a vacant possession, which is possessed neither mentally nor bodily, as an inheritance lying vacant before it is entered upon by the heir, or at least by the chief lord for the purpose of custody or for the purpose of escheat, if by chance there are no heirs, or if after the death of any one, after the making of a fine, or through means of donation, where

sive locum vendicare nō possit, vel si post mortem alicujus, qui tenuit ad vitam, debeat tenementū reverti ad proprietarium, ponat quis se in seysinam, antequam tenementum illud perveniat ad illum, ad quem pervenire deberet, ex prædictis causis. Et quæ possessio vacua dici debeat & quæ non, suprà sufficienter videri
L. II. c. 1. § 2. poterit, in titulo de acquirenda possessione. Cùm autem quis ita se intruserit, cùm nihil juris habeat, & hæredem venientem, vel dominum capitalem (ut prædictum est), vel eum ad quem tenementum reverti deberet pluribus modis, per finem factum, per modum donationis, vel ut eschaeta pro defectu, vel p̄ delicto, vel alio quocunq; modo non admiserit: succurritur ei ad quē tenementū reverti debet pluribus modis, secun-
f. 160 b. dùm diversitatem casuum, p̄ talia brevia, si autem reverti debeat ad dominū capitalē tanquam eschaeta sua, eò quòd feoffatus sibi & hæredibus suis de corpore suo p̄venientibus obierit sine hærede de se, s. de corpore suo, tunc sic.

2. De terra, quæ reverti debet ut eschæta tanquam ad capitalem dominum pluribus rationibus.

Rex vic. salutem. Pone p̄ vadiū & salvos plegios, vel certos plegios A. quòd sit coram &c. ad respondendum B. quare intrusit se in tantā terrā cum pertinentiis in tali villa, quā C. tenuit de p̄dicto B. & unde idem C. fuit seysit[2] die quo obiit, & quæ ad ipsum B. reverti debuit tanquā ad capitalem dñm illius feodi, eò quòd p̄d C. obiit sine hærede de se, & habeas &c. Teste &c.

3. Si quis se intruserit in terram aliquam, et quæ reverti debet.

Item aliud de eodem, ubi quis se intruserit in terram aliquam quasi hæres, cùm non sit, super seysinam domini capitalis, & quæ remanere debet in manu sua, donec rectus heres veniret ad faciendum ei, quod de jure facere deberet, & tunc sic.

succession cannot claim a place, or if, after the death of any one who held it for life, a tenement ought to revert to the proprietor, some one puts himself into seysine, before that tenement comes to him, to whom it ought to come, for the aforesaid reasons. And what possession ought to be called vacant, and what not, may be sufficiently seen in the title concerning the acquiring of possession. But when a person has so intruded himself, when he has no right, and has not admitted the heir coming to it, or the chief lord (as aforesaid), or him to whom the tenement ought to revert in various ways, by the making of a fine, by means of donation, or as an escheat from default, or for an offence, or in any other manner, succour is afforded to him to whom the tenement ought to revert in several ways, according to the diversity of cases by writs of this kind, but if it ought to revert to the chief lord, as hisescheat, because the feoffee, who held it for himself and the heirs springing from his own body, has died without offspring from himself, that is from his own body, then in this way. f. 160 b.

2. Concerning land, which ought to revert as an escheat, as it were to the chief lord, for many reasons.

The king to the viscount greeting. Place A. under bail and safe sureties or certain sureties, that he shall be, &c. to answer B. why he has intruded himself into so much land with its appurtenances in such a vill, which C. held of the aforesaid B., and of which the said C. was seysed on the day on which he died, and which ought to revert to B. as to the chief lord of that fee, inasmuch as the aforesaid C. has died without an heir from his body, and have, &c. Witness, &c.

3. If any one has intruded himself into a certain land, and which ought to revert.

Likewise another writ concerning the same, where a person has intruded himself in a certain land, as if he were the heir, when he is not, upon the seysine of the chief lord, and which ought to remain in his hands, until the right heir should come to do that to him, which he ought to do of right, and so thus.

4. Item quo warranto se intrusit. Ad respondendum quo warranto se intrusit in tantam terram, quæ est de feodo ipsius B. & quā prædictus B. ceperat in manū suam, donec rectus hæres veniret ad faciendum ei, q̄ de jure facere deberet, ut dicit, & habeas &c. Et sic cōpetit capitali domino actio ratione eschaetæ, & ratione custodiæ. Et cùm nullum competat ei remedium ordinariū, q̄ loqui possit de seysina propria vel antecessoris, de necessitate recurritur ad extraordinarium, & ad hujusmodi brevia formata, Item aliud de eodem jure alicui competente, & tunc sic.

5. Breve de intrusione. Ad ostendendum quare intrusit se in tantā terrā &c. quam B. clamat tenere de C. filio & hærede D. qui quidem terram illam dedit prædicto B. in ligea potestate sua, de assensu & voluntate prædicti C. filii & hæredis sui, & similiter de assensu & voluntate p̄dicti A. capitalis domini illius terræ (ut dicit) vel aliter.

6. Item quare se intrusit. Quare se intrusit in tantam terram &c. quam idem B. clamat versus prædictum A. p̄ breve nostrū de recto in tali curia. Et unde idem A. se posuit in magnam assisam nostram, & p̄quisivit sibi breve nostrum de pace nostra habenda, usq̄ ad adventum justiī in partes illas, & in quas nondum venerunt, ut idem A. dicit, vel aliter: Quare se intrusit in tantam terram &c. quæ ad ipsum B. reverti debuit post mortem talis mulieris, quæ terram illam tenuit in dotem de dono talis, ratione finis facti inter prædictos B. & talem antecessorem ipsi⁹ A. cujus hæres ipse est ut dicit. Et hujusmodi forma brevis locum habet in omni casu, ubi quis se intruserit in terram aliquam, quam quis tenuerit ad vitam suam nomine dotis, vel p̄ legem Angliæ, vel alio quocunq̄ modo, & quæ reverti deberet post mortem talium ad verum hæredem, vel ad

4. Likewise on what warrant he has intruded himself.

To answer upon what warrant he has intruded himself into so much land, which is of the fee of B. himself, and which B. aforesaid has taken into his hand until the right heir should come to do that to him, which he ought of right to do, as he says, and have, &c. And so the chief lord is entitled to an action by reason of escheat and by reason of custody. And when he should be entitled to no ordinary remedy, that he may speak of his own seysine or of that of an ancestor, recourse is of necessity had to an extraordinary remedy and to formal writs of this kind. Likewise another writ concerning the same right attaching to any one, and then thus.

5. A writ of intrusion.

To show wherefore he has intruded himself into so much land, which B. claims to hold of C. the son and heir of D., who gave that land to the aforesaid B. in his liege power of the assent and free will of the aforesaid C. his son and heir, and in like manner of the assent and free will of the aforesaid A. the chief lord of that land (as he says), or otherwise.

6. Likewise, wherefore he has intruded himself.

Wherefore he has intruded himself into so much land, &c., which the said B. claims against the aforesaid A. by our writ of right in such a court, and whence the said A. has placed himself upon our great assise, and has requested for himself our writ concerning the maintenance of our peace until the coming of our justiciaries into those parts, and into which they have not yet come, as the said A. says, or otherwise: wherefore he has intruded himself into so much land, &c., which ought to revert to B. after the death of such a woman, who held that land in dower from the donation of such a one, by reason of a fine made between the aforesaid B. and such an ancestor of B. himself, whose heir he is, as he says. And this form of writ has a place in every case, where any one has intruded himself into any land, which a person held for his life in the name of dower, or by the law of England, or in any other way, and which ought to revert after the death of certain persons to the true heir or to others by making

alios p̄ finem factum, vel alio modo quocunq̄. Si autem tales in vita sua donationes fecerint, tunc locum habebit breve de ingressu, sicut infrà dicetur.

7. Si quis post mortem uxoris suæ se tenuerit in possessione.

Itē poterit quis post mortē uxoris suæ se tenere in seysina tanquā p̄ legem Angliæ, licèt liberos simul non habuerint, & tunc fiat tale breve: Quia possessio aliquando jus parit, & quia p̄ possessione p̄sumitur de jure, ideò infra annum ad min⁹ ejiciat verus hæres intrusorem, vel si non, versus eum p̄quirat per breve, quia de longiori tempore non respondebit ad intrusionem. Ut de termino Sancti Mich. anno regis H. nono incipiente decimo in com̄ Norf. & Suf. de Simon de Rakfeld, quòd post longum tempus agi non poterit de intrusione, scilicet post decem annos vel duodecem, nec
f. 161. p̄ breve nec sine brevi. Si autem intrusor recenter ejectus fuerit & antequam habuerit longum tempus & pacificum (annale videtur secundùm quosdam), per assisam novæ disseysinę nō recuperabit, ut de itinere M. de Pateshul in com̄ Hereford & Wigorn̄ anno regis Henrici tertio, assisa novæ disseysinæ si W. Camberlanus. Si autem, fiat tale breve. Præcipe A. q̄ justè & sine dilatione reddat B. tantam terram &c. & in quam non habet ingressum nisi p̄ intrusionem, quam fecit in eandem terram post mortem talis &c. Et si tenens dicit q̄ nihil teneat, nisi nomine alicuj⁹ qui fuit infra ætatem & in custodia sua, & quòd inde nihil lucrari possit nec perdere, cadit breve. Item si uterq̄ nominetur in brevi tam custos quàm minor, cadit breve pro custode: quia nihil inde tenet nisi nomine custodiæ. Si autem, ita dicatur.

8. Breve de attachiendo.

Pone per vadium & salvum &c. ut supra, & ita quòd actio omnino sit personalis, quāvis in brevi uterq̄ no-

a fine, or in any other way. But if such persons during their lifetime have made donations, then a writ of entry, as will be explained below, will have a place.

7. If a person after the death of his wife has kept himself in possession.

Likewise a person may after the death of his wife keep himself in seysine as if by the law of England, although they have not had children together, and then let such a writ issue: because possession is sometimes the parent of right, and because from possession there is a presumption concerning right, therefore let the true heir eject the intruder within a year at least, or if not, let him proceed against him by a writ, for after a longer time he shall not answer to the intrusion. As in Michaelmas term in the ninth and tenth years of king Henry, in the counties of Norfolk and Suffolk, concerning Simon de Rakfeld, that after a long time no action for intrusion will lie, for instance after ten or twelve years, neither with a writ nor without one. But if the intruder has f. 161. been recently ejected and before he has had a long and peaceable time of possession (a year's time according to the opinion of some) he shall not recover by an assise of novel disseysine, as in the iter of Martin de Pateshull in the counties of Hereford and Worcester in the third year of king Henry, an assise of novel disseysine, if William the Chamberlain. But if so, let such a writ issue. Enjoin A. that justly and without delay he restore to B. so much land, &c., and into which he has no entry except by an intrusion, which he made into the same land after the death of such an one, &c. And if the tenant say that he holds nothing except in the name of some one, who is below age and in his wardship, and that he cannot gain or lose anything by it, the writ falls. Likewise if both are named in the writ, the guardian and the minor, the writ falls as regards the guardian, because he holds nothing therein except in the name of wardship. But if so, let it be thus worded:

8. A writ of attachment.

Put under bail and safe sureties, &c. as above, and so that the action may be altogether personal; although

minetur, non cadit breve, cùm aliquo casu sapiat naturam novæ disseysinæ: quia non agitur specialiter de tenemento cum intrusione, sed tantùm de intrusione per se, & ubi culpabiles esse poterunt de intrusione tam illi qui jus habent in re, quàm illi qui jus non habent. Cùm autem intrusor, cùm recenter ejectus fuerit, habere non possit assisam, eadē ratione nec convictionem super assisam, si per assisam amiserit. Item si non habeat actionem, neq; exceptionem, si aliquem spoliaverit, si ad ipsum nihil pertineat disseysina: ut si dicat fortè q disseysitus servus sit, vel q nihil juris habuerit in tenemento, vel quòd bastardus, vel quòd teneram seysinā, quia nihil ad eum: & quia si petere vellet per actionem, nulla ei competeret. Et sic posset tenens semper remanere in possessione, licèt nihil juris haberet in re possessa: Quia cùm neuter jus habeat, melior est causa possidentis, & ideò si ille qui jus non habeat talem ejiciat, ejector exceptionem contra ipsum non habebit, cùm si peteret, actionem non haberet.

9. Item adhuc de intrusione.

Item agere poterit de intrusione quis, ubi ratione alicuj[9] chartæ vel homagii se posuerit quis in seysinam de aliquo tenemento, de quo nullam habuit seysinam in vita donatoris. Item si se posuerit in seysinam sine brevi procuratorio vel warranto.

10. Item si duobus facta fuerit donatio, et de intrusione.

Item si cum duobus facta fuerit donatio & alteri eorū traditio, unus ꝑpria autoritate ratione nudæ chartæ se posuerit in seysinā. Itē fieri poterit breve de intrusione breviter & in generali forma, sic: Ostēsurus quare intrusit se in tantam terram &c. quam B. qui nuper obiit, tenuit de eodem A. ad vitam suam tantùm, & quæ post mortem ejusdē B. ad eundem A reverti debuit, ut idem A. dicit, & habeas &c.

both be named in the writ, the writ does not fall, since in some case it savours of the nature of novel disseysine; because the proceeding is not specially concerning a tenement with intrusion, but only concerning an intrusion by itself, and where those who have a right in the thing, as well as those who have no right, may be culpable for the intrusion: but since the intruder, when he has been recently ejected, cannot have an assise, for the same reason he cannot have a conviction upon an assise, if he has lost by an assise. Likewise since he has not an action, neither has he an exception if he has despoiled any one, if the disseysine does not at all pertain to him; as if he should say that the party disseysed is a serf, or that he has no right in the tenement, or that he is a bastard, or that he has a tender seysine, because nothing belongs to him, and because if he claimed by an action, he is not entitled to any. And thus a tenant may remain always in possession, although he may have no right in the thing possessed. For when neither has any right, the cause of him who is in possession is preferable, and accordingly if he who has no right ejects such an one, the ejector will not have any exception against him, since if he were the claimant, he would not have any right of action.

9. Further concerning intrusion.

Likewise a person may proceed for intrusion, where by reason of any charter or homage he has put himself into seysine of any tenement, of which he had no seysine in the life of the donor. Likewise if he has put himself into seysine without letters of proxy or a warrant.

10. Likewise if a donation has been made to two persons. Also concerning intrusion.

Likewise when a donation has been made to two persons, and delivery to one of them, the other of his own authority by reason of the bare charter puts himself into seysine. Likewise a writ of intrusion may be made briefly and in a general form, thus: In order to show wherefore he has intruded himself into so much land, &c., which B., who lately died, held of the said A. for his lifetime only, and which after the death of the said B. ought to revert to A., as the said A. says, and produce, &c.

Cap. III.

1. Qualiter amissa possessio per vim injuriosam per assisam novæ disseysinæ restituatur, et de qualitate disseysinæ.

f. 161 b. Britton, l. ii. c. xi. § 2. Fleta, 213.

Dictum est suprà qualiter possessio, acquisita ex quacunque causa acquisitionis, de voluntate possidentis ad alium transferatur. Nunc autem dicendum est, qualiter semel acquisita contra voluntatem possessoris per vim injustã auferatur & amittatur, & qualiter & qua actione, cùm amissa fuerit, spoliato restituatur: quia nemo debet sine judicio disseysiri de libero tenemento suo, nec respondere sine præcepto domini regis, nec sine brevi. Sed inprimis videndum erit, qualiter fit disseysina, & quibus modis, posteà verò quale competat remedium incontinenti vel ex postfacto: priùs enim cognosci debet de transgressione vel injuria, & facti qualitate, ut postmodum faciliùs sciri possit quale sequatur remedium, & quæ pœna subsequatur. In hoc autem judicio novæ disseysinæ, quod ex maleficio oritur, persequitur quis ipsam rem & persequitur pœnam, & est personale, sicut jus bonorum raptorum, & ibi pœna triplex: una propter spoliationem contra pacem, ubi infligenda est pœna corporalis, alia propter injustam detentionem, ubi infligenda erit pœna pecuniaria. Item persequitur quis damna sua quæ sustinuit medio tempore spoliationis. Est etiam pœna adjecta, quòd disseysitor principalis, unus & non omnes, cùm per assisam convicti fuerint, dant vicecomiti bovem de consuetudine, licèt non de jure. Fit autem disseysina non solùm cùm quis præsens, vel procurator, vel familia qui nomine suo fuerit in seysina, violenter, injustè, & sine judicio de libero tenemento suo qualicunque, ejecti fuerint: verùm etiam fit disseysina, cùm quis ad nundinas, vel peregrè profectus

Chapter III.

We have discussed above how possession, having been acquired from whatever cause of acquisition, is transferred with the will of the possessor to another person. Now we must discuss, how, having been once acquired, it may be taken away against the will of the possessor by unjust violence and may be lost, and in what way and by what action, when it has been lost, it can be restored to the person despoiled of it, because no person ought to be disseysed of his freehold without a judgment, nor answer without an order of the lord the king, nor without a a writ. But we must see in the first place, in what way the disseysine takes place, and by what means, afterwards what is the fitting remedy forthwith or after the act is complete, for first of all cognizance must be had of the trespass and the injury, and the quality of the act, that afterwards it may be more easily known, what remedy follows, and what penalty attends. But in this judgment of novel disseysine, which arises upon a misdeed, a person sues for the thing itself and sues for a penalty, and it is a personal claim, like the claim for goods carried away by force, and there the penalty is threefold, one on account of the spoliation against the peace of the realm, in which case corporeal punishment is to be inflicted, another on account of the unjust detention, in which case a preliminary penalty is to be inflicted. Likewise a person sues for his own damages, which he has undergone during the intermediate time of the spoliation. A penalty is also added, that the principal disseysor, one and not all, when they have been convicted by an assise, give to the viscount an ox by custom, although not by right. But a disseysine takes place, not only when any one present, or his agent, or his family, who have been in seysine in his name, have been ejected violently, unjustly, and without a judgment from his freehold of any kind soever, but a disseysine takes place, when a person has gone a shopping or has

1. In what way possession, lost by unjust violence, may be restored by an assise of novel disseysine, and of the quality of the disseysine. f. 161 b.

fuerit nemine in domo relicto vel possessione, alius in possessionem ingrediatur, & ipsum reversum non admittat, vel cùm ingredi voluerit, per se, vel assumptis viribus violenter repellat. Fit etiam disseysina, non solùm si quis verum dominum præsentem, procuratorem, vel familiam ejiciat, vel reversum à nundinis vel à peregrinatione non admittat vel repellat: verùm etiam disseysinam facit, si ipsum, vel procuratorē, vel familiam in possessione existentem uti omnino non permittat, vel saltem impediat quo min⁹ commodè uti possit. Et quo casu, licèt eum omnino non expellat, tamen facit ei disseysinam, cùm commodum utendi ei omnino auferat, vel quo min⁹ commodè, quietè & in pace uti possit impediat, possessionem inquietando & perturbando. Item non solùm fit disseysina, secundùm quod prædictum est, sed etiam si quis præpotens uti voluerit in alterius tenemento contra ipsius tenentis voluntatem, arando, fodiendo, falcando & asportando, contendendo tenementum esse suum quod est alterius; si autem nihil clamaverit in tenemento, aliud erit, quia tunc erit transgressio, & non disseysina de libero tenemento; vel pecora immittendo vel alio quocunque modo sic servitutem imponendo fundo, qui priùs liber erat. Et unde, quamvis omnino non expellat vel impediat, sic imponendo servitutem, aufert libertatem quo min⁹ possessor liberè teneat. Item facit quis disseysinam ei qui possidet, ut cùm jus habeat utendi fruendi in alieno, uti voluerit alio modo, alio tempore, alio genere, quàm uti deberet, vel aliter quàm servitus fuit constituta. Item facit quis disseysinam, non solū si fiat ut prædictum est, sed fit, cùm quis in seysina

set forth on a journey, no one having been left in the house or in possession, and another person enters into possession, and does not admit him on his return, or when he wishes to enter, repels him violently by himself or with assistance called in. Likewise a disseysine takes place, not only if any one ejects the true owner when present, or his agent, or his family, or does not admit him, or repels him on his return from market or from a journey, but he also effects a disseysine, if he shall not permit the owner or his agent or his family being in possession to make use of it, or at least hinders him from making a convenient use of it. And in which case, although he does not altogether expel [the owner], nevertheless he inflicts upon him a disseysine, since he takes away from him altogether the convenience of using it, or hinders him from using it conveniently, quietly, and in peace, by disquieting and disturbing his possession. Likewise a disseysine takes place not only according to what has been said above, but also if any person of greater power wishes to make use of the tenement of another against the will of the tenant, by ploughing, or by digging, by reaping and carrying away, contending that the tenement, which is anothers, is his own; but if he has made no claim to the tenement, it will be another thing, because then there will be a trespass, and not a disseysine from a freehold, or by turning in sheep, or in some other manner imposing a servitude upon land, which was free beforehand. And whereby, although he does not at all expel or impede [the owner], by thus imposing a servitude, he takes away the liberty, so as to prevent the possessor enjoying the freehold. Likewise a person causes a disseysine to him who possesses, as when a person has the right of usufruct in another's land, he has wished to use it in another manner, at another time, in another way, from that in which he ought to use it, or otherwise than as the service has been established. Likewise a person causes a disseysine, not only if it be done as aforesaid, but

fuerit ut de libero tenemento & ad vitam, vel ad terminum annorum, vel nomine custodiæ, vel aliquo alio modo, alium feoffaverit in præjudicium veri domini, & fecerit alteri liberum tenementū: cùm duo simul & semel de eodem tenemento & in solidū esse non possunt in seysina. Item facere poterit quis disseysinam sub colore districtionis, ut si quis distringat ꝑ servitio, cū nihil ei debeatur, vel cùm ei solutum fuerit, vel cùm modum districtionis excedat. Itē si quis uti voluerit cū justè possidente, velit nolit, & si cōtra suā voluntatē opus fecerit manufactum. Item facit disseysinam, qui justè possidentem impedit, quo minꝰ in pace & quietè uti possit, faciendo ei contētionem injustā: sed omnis contentio non erit injusta, ut si verꝰ dominus cōtentionem moveat ei, qui rem suam injustè detinet, ne pacificā habeat possessionem sive seysinam, sed interruptam ne currat tempꝰ per desidiam. Item disseysiri poterit quis injustè & sine judicio de tenemēto suo, licèt tenemētum non teneat liberè, sed ad terminum annorū, vel de dominico dñi regis, vel hujusmodi: talibus injuriari poterit sicut aliis prædictis, sed nō hic succurritur eis ꝑ tale breve.

f. 162.

Cap. IV.

1. De violenta disseysina, i.e., de simplici violentia et sine armis. Item de vi et vi armata, et quid est vis. Dig. XLIII. t. xvi.

Dictum est suprà de qualitate disseysinæ, & quæ aliquando potest esse violenta, & aliquando simplex sine violentia, & violentaa sine armis, & violenta cum armis. Est enim vis simplex & vis armata, quia dicitur de vi, & vi armata: & ideò de vi inprimis videndum, quid sit vis.

2. Quod pluribus

Et sciendum, quòd vis est majoris rei impetus, cui resisti non potest. Dividitur autem sic, quòd alia sim-

if, when a person has been in seysine as of a freehold and for life, for a term of years, or in the name of wardship, or in any other manner, and he has enfeoffed another to the prejudice of the true lord, and has conveyed to another a freehold, since two cannot be in seysine together and at once of the same tenement, and for the whole of it. Likewise a person may make a disseysine under colour of a distraint as if a person should distrain for a service, when nothing is due to him, or when it has been paid to him, or when it exceeds the measure of the distraint. Likewise if a person wishes to employ a thing in company with the person justly possessing it, whether he is willing or not, and if contrary to his will he has manufactured an article with it. Likewise he causes a disseysine, who impedes a person justly possessing a thing, from using it in peace and quiet, by entering into an unjust dispute with him, but every dispute will not be unjust, as if the true owner raises a dispute with him, who unjustly detains his property, lest he should acquire a peaceful possession of seysine, and interrupts it lest time should run through carelessness. Likewise a person may be disseysed unjustly and without a judgment from his tenement, although he does not hold his tenement as a freehold, but for a term of years, or of the demesne of the lord the king or such like; injury may be done to such persons as to others aforesaid, but succour is not afforded to them by a writ of this kind. f. 162.

1. Of violent disseysine, that is, of simple violence and without arms. Likewise of force and armed force, and what is force.

We have spoken above of the quality of disseysine, and which may be sometimes violent, and sometimes simple without violence, and violent without arms, and violent with arms. For there is simple force and armed force, because the law distinguishes between "force" and "armed force," and therefore let us speak of force, what it is.

2. That force is spoken of in many ways.

And it is to be known that force is the attack of a greater thing, to which resistance cannot be made. But

modis dicitur vis. Britton, ii. ch. xxix. § 4. Fleta, 220.

plex, alia expulsiva omnino, & expulsiva cum armis vel sine armis. Item alia clandestina & de nocte, alia palam & publica, & de die. Item alia justa, alia injusta. Item alia per violentiam, alia sine violētia: sicut in rem vacuam. Item expulsiva locum habet in rebus corporalibus & immobilibus, sicut in terris & tenementis. Item locum habet in rebus incorporalibus, sicut in iis quæ in jure consistunt, sed non ita omnino, sed in parte & alio modo. Item vis alia perturbativa, scilicet ubi quis contendit se possidere, cum jus non habeat, & alius dicat se esse in possessione, cū jus habeat. Item alia vis inquietativa, ubi quis non permittit alium uti possessione quietè & in pace. Est etiam quies & non quies, quod idem est q inquies. Est etiam vis ablativa, quæ convertitur simul cum perturbativa: cum aliquis scilicet fodiat in alieno vel falcet, & sic perturbet, ut auferat & asportet rem mobilem de re immobili. In rebus antem mobilibus vel se moventibus, locum non habet p se, ut in illis quæ per vim rapiuntur, auferuntur, & asportantur. Item est vis compulsiva, quæ aliquando metum inducit, ubi scilicet quis alium in carcere & in vinculis detinuerit, vel ēvaginato gladio compulerit ad aliquid dandum, vel faciendum contra ipsius voluntatem. Et exceptionem inducit, sive vis illata fuerit alicui vel filio vel nepoti,[1] vel patri in filio vel nepote. Item est vis injuriosa & illicita, & quædam licita & non injuriosa, sive fuerit simplex vel violenta, inermis vel armata.

3. Quæ dicuntur arma.

Est etiam vis armata (armis dejectum dico, qualitercunque fuerit vis armata) non solùm, si quis venerit cum telis, verùm etiam omnes illos dicimus armatos,

f. 162 b.

[1] "alicui filio vel nepoti in patre," MS. Rawl. C. 160.

it is thus divided, that some is simple and some altogether expulsive, and expulsive with arms, or without arms. Likewise, some is clandestine and of night, some open and public and by day. Likewise some is just, some unjust. Likewise some is with violence, some without violence, as into an empty thing. Likewise expulsive force has place in corporeal things and in immovables, as in lands and tenements. Likewise it has place in incorporeal things, as in those which consist in right, but not so altogether, but in part and in different ways. Likewise some force is disturbing, for instance, where one contends that he possesses, when he has no right, and another says that he is possession, when he has right. There is likewise disquieting force, where a person does not allow another to use his possession quietly and peaceably. For there is quiet and the absence of quiet, which is the same as disquiet. There is likewise ablative force, which is combined with disturbing force, when any one digs in another's ground, or reaps and so disturbs, that he may carry away and transport a movable thing from an immovable thing. But in movables, or things which move themselves, it has no place by itself, as in things which are taken by violence, carried away and transported. Likewise there is compulsive force, which sometimes causes fear, for instance, where a person has detained another in prison or in chains, or with an unsheathed sword has compelled another to give him something, or to do something against his will. And it lets in an exception, whether the violence has been done to a person himself or to his son or to his grandson, or to a father in the case of his son or his grandson. Likewise there is injurious and illicit force, and same force which is licit and not injurious, whether it be simple or violent, unarmed or armed.

3. What are called arms.

There is also armed force (I speak of a person as ejected by arms, whatever may be the nature of the arms) not only if a person comes with weapons, but we call all those armed persons who have anything f. 162 b.

Britton, l. ii. ch. xxii. § 4.

qui habent cum quo nocere possunt. Telorum autem appellatione omnia, in quibus singuli homines nocere possunt, accipiuntur, sed si quis venerit sine armis & ipsa concertatione ligna sumpserit, fustes & lapides, talis dicetur vis armata. Si quis autem venerit cum armis, armis tamen ad dejiciendum non usus fuerit, & dejecerit, vis armata dicitur esse facta: sufficit enim terror armorum, ut videatur armis dejecisse. Si autem cùm dominus à peregrinatione vel nundinis reversus fuerit, & armati qui possessionem invaserint eum prohibuerint ne ingrediatur, videtur eum armis esse ejectum, & talis vis dici poterit repulsiva. Item cùm procurator generalis armatus venerit, & ipse dominus videtur armis dejecisse, sive hoc mandaverit sive ratum habuerit: & hoc quidem erit dicendum de familia, cùm familia armata venerit. Ego enim non videor venisse armatus, sed familia, nisi jussi vel ratum habui: & secundùm præcedentia, qualitas facti facit pœnam graviorem vel minùs gravem. Sed sive fuerit vis armata vel inermis; quælibet talis non erit injuriosa, quia armorum quædam sunt tuitionis, & quod quis ob tutelam sui corporis fecerit vel sui juris, justè fecisse videtur. Item sunt arma pacis & justitiæ, & arma perturbationis pacis, & injuriæ. Sunt etiam arma usurpationis rei alienæ, & talis vis dici poterit ablativa, unde & ei, qui justè possidet, licitum erit cū armis contra pacem venientem, ut expellat, cum armis repellere, ut p arma tuitionis & pacis, quæ sunt justitiæ, repellat injuriam, & vim injustā, & arma injuriæ: sed tamen cum talis discretionis moderamine, q injuriam nō committat, non enim poterit sub tali prætextu

with which they may do hurt. But all things with which individual men may do hurt, are included under the appellation of weapons; but if any one has come without arms, and in the course of the struggle has taken up sticks, staves, and stones, such force will be called armed force. But if a person has come with arms, but has not used his arms to eject a person, and he has ejected him, armed force is said to have been used, for the terror of arms is sufficient, for him to seem to have ejected him by arms. But if when the owner has returned from a market or from a journey, and armed men who have invaded his possession have prohibited him from entering, it seems that he has been ejected by arms, and such violence may be called repulsive. Likewise when a general agent has come armed, the owner himself appears to have ejected with arms, whether he has given a mandate to that effect or has ratified the act, and this may also be said of a household, if the household has come armed. For I do not appear to have come armed, but my household, unless I have ordered it or ratified it, and according to what precedes, the quality of the act causes a more heavy or a less heavy penalty. But whether it be armed force or unarmed force, all such force is not injurious, because some arms are used for protection, and what a person may do for the protection of his own person or of his own right he seems to have done justly. Likewise there are arms of peace and of justice, and arms of disturbance of peace and of injustice. There are likewise arms of usurpation of another's property, and such force may be called ablative, whence it will be allowable to him, who justly possesses, to repel with arms any one coming with arms against the peace [of the realm] to expel him, that by the arms of self-protection and of peace, which are the arms of justice, he may repel injury and unjust violence and arms of injury; but nevertheless with the moderation of such discretion, that he does not cause an injury, for he may not under such pretext kill a man, or wound

hominem interficere, vulnerare, vel malè tractare, si alio modo suam tueri possit possessionē. Ei igitur, qui vult viribus uti, erit viribus viriliter resistendum cum armis vel sine, juxta illud: Cùm fortis armatus &c., sed tamen quolibet tempore sine causa non erit cum armis incedendum. Venit etiam quis, ut justè possidentem cū viribus ejiciat, sed cùm possidens ei resistat, q opere adimplere non possit, quod in animo habuerit & in voluntate, in assisam non incidit, nec debet ei obesse conatus, ubi injuria nullum habuit effectum. Sunt etiam quidam qui dicunt, & putant vim solùm esse, cùm homines vulnerentur: sed regulariter verum est contrarium, quòd vis est, quotiens quis (quod sibi videri[1] putat) non per judicem reposcit. Hæc autem de vi dictą, ad præsens sufficiant. Sed quia vis aliquando metum inducit, ideò videndum quid sit metus, & sciendum, ut suprà de donationibus pleniùs.

Cap. V.

1. De primo remedio post disseysinam, et ubi incontinenti licet rejicere, et quomodo et quando. f. 163. Britton, ii. ch. xiii. § 1. Fleta, 215.

Si verò aliquo prædictorum modorum facta fuerit disseysina, primum & principale competit remedium tale, videlicet quòd ille, qui ita disseysitus fuit, per se si possit, vel sumptis viribus vel resumptis, dum tamen sine aliquo intervallo, flagrante disseysina & maleficio, rejiciat spoliantē, vel si tenens, cùm fuerit in possessione sive in seysina, & alius cum eo uti voluerit, ipso nihilomin[2] utatur, nisi omnino injustè utentem tenere possit ab utendo exclusum: quia per usum suum sic utendo, justè retinet seysinam suam, alius verò utendo injustè in alieno nihil sibi per ùsum injustum acquirit. Si autem ipsum nullo modo expellere possit, ad superioris auxilium erit recurrendum, ut ei pacificè liceat acqui-

[1] "deberi," MS. Rawl. C. 160.

him, or ill-treat him, if he can in any other way protect his possession. And therefore against him, who wishes to use his strength, he may resist with his utmost strength, as a man, with arms or without, according to the saying, When a strong man armed, &c.: but nevertheless persons may not walk about with arms at all times without some cause. Some one also comes to eject with force one who is justly in possession, but when he who is in possession resists him, so that he cannot in fact accomplish what he had in his intention and his will, he does not come under an assise, nor ought the attempt to prejudice him, where the injury has not had any effect. There are some who say and think that there is force only, where men are wounded, but regularly speaking the contrary is true, that force is used as often as a person reclaims without the aid of a judge, what he thinks to belong to himself. But so much respecting force may suffice to be said at present. But because force sometimes causes fear, therefore we must see what is fear, and it may be known more fully as above stated concerning donations.

Chapter V.

1. Concerning the first remedy after a disseysine, and where it is allowable forthwith to repel, and how and when.

But if a disseysine has been made in any of the above ways, the first and principal remedy is of this kind, namely that he who has been disseysed, may reject the spoiler by his own strength if he can, or by strength which he has called in or recalled, provided no interval has elapsed, the disseysine or misdeed being flagrant, or if the tenant, when he was in possession or in seysine and another wished to use it with him, nevertheless himself uses it, unless he can keep the person unjustly using it excluded from using it, because by his own use in so using it, he justly retains his seysine, but the other in unjustly using it acquires nothing for himself in another person's property by his unjust use of it. But if f. 163. he can in no way expel him, he must have recourse to the power of a superior that he may be allowed to acquire

rere & quietè uti. Incontinenti vim vi repellere est, quā citò sciri possit vim esse illatam, priusquam ille, cui illata fuerit, ad actum contrarium divertat. Si autem omnino quis uti impediverit vel min⁹ commodè, incontinenti repellatur, si fieri possit, alioquin ad superiorem recurratur ut suprà. Incontinenti autē quid sit videndum, & infra quod tempus. Tempus autem non definitur, sed præsumitur quòd tantum tempus habere deberet, quantum haberet, si esset super proprietate implacitatus, scilicet quindecem dierum, quo tamen jure ad præsens non utitur. Videndum est etiam, utrum disseysitus præsens fuerit vel absens tempore disseysinæ, vel utrum ipse personaliter ejiciatur vel ejus procurator, vel familia, vel dum absens fuerit alius ingrediatur in suam vacuam possessionem. Vacuam dico corpore, licèt non animo. Si autem præsens fuerit tempore disseysinæ, tunc statim & eodem die, si possit, rejiciat disseysitorem, nisi hoc elegerit propter desperationem, quòd sibi velit requirere, & electa via illa & facta impetratione, ad rejectionem redire non poterit, nec seysinam suam propria autoritate resumere, in præjudicium superioris, ad quem jam devoluta est cognitio. Si autem talem viam non elegerit fiat in crastino, tertio die vel quarto, vel ulteriùs cum debita continuatione, quod fieri debuit prima die: quia si primo die rejicere non potuit, potest tamen in crastino vires resumere, arma congerere, & auxilia amicorum invocare, quòd si per longum tempus expectaverit, videtur per hoc injuriam dissimulare, & per hoc illam penitus aboleri. Dictum est suprà, quòd si possessor,[1] procurator vel familia præsens ejiciatur, & nunc dicendum erit, si reversus

[1] "Dictum autem si possessor," MS. Rawl. C. 160.

it peaceably and to use it quietly. "Forthwith to repel "force by force" is to do so as soon as it can be known that force has been used, before that he, against whom it has been used, has betaken himself to a contrary act. But if a person has altogether hindered the use of it or made the use less convenient, let him be forthwith repelled, if it be possible to be effected, otherwise let recourse be had to a superior as above. But we must see what is meant by the term "forthwith," and within what time. But the time is not defined, but it is presumed that he ought to have so much time, as he would have, if he were impleaded respecting the property, namely fifteen days, which right however he does not enjoy at present. We must likewise see whether the person disseysed was present or absent at the time of the disseysine, or whether he was himself personally ejected, or his agent or his household, or whilst he was absent another person entered into his possession then vacant. I mean vacant corporeally, although not mentally. But if he was present at the time of the disseysine, then let him expel the disseysor immediately and on the same day, if he can, unless he has from despair chosen this, that he should wish to claim it by a requisition, and if that way be chosen and a requisition be lodged, he cannot return to expulsion, nor resume seysine of his own authority to the prejudice of his superior, to whom the cognisance has devolved. But if he has not chosen such a way, let him do on the morrow or on the third or the fourth day or further with due continuation, what he ought to have done on the first day: because if he could not reject him on the first day, he may be able on the morrow to rally his forces, to collect arms, and to invoke the aid of friends; but if he has waited for a long time, he seems thereby to dissemble the injury, and thereby altogether to blot it out. It has been discussed above, if the possessor or his agent or his family, when present, should be ejected, now we must discuss the case if having

ingredi prohibeatur, vel repellatur, vel credat se posse repelli. Si autem absens fuerit ex quacunq; causa necessaria negotiationis communis, vel peregrinationis, vel alia quacunque, oportebit distinguere locorum distantiam & tempora, vel diligentiam vel negligentiam disseysiti: secundùm quod fuerit in eodem comitatu propè, vel in alio comitatu longè, vel alibi, dum tamen infra regnum. Longè vel longiùs distinguatur, quo tempore scire potuit disseysinam esse factam, & non tempus quo scivit, & quo casu in veniendo computandæ sunt rationabiles dietæ, ut sic allocatis ei rationabilibus dilationibus, infra quartum diem vel ulteriùs ex causa ut prædictum est, dejiciat disseysitorem, quod satis erit incontinenti, cùm non currat tempus ei nisi ex tempore scientiæ, & ex quo post scientiam venire potest commodè. Si autem extra regnum in peregrinatione simplici apud Sanctum Jacobum, vel in servitio domini regis fortè in Vascoñ, dilationē habebit quadraginta dierum, & duoꝝ flodorum, & unius ebbæ, quia de ultra mare, & similiter spaciū quindecem dierū, postquā venerit in regnum & etiam quatuor dierum, ut prædictum est, ut vires resumat &c. Si autem extra regnum in simplici peregrinatione in Terra Sancta, tunc dabitur ei dilatio unius anni extra regnum, & quindecem dierum & quatuor infra, ut prædictum est. Si autem in generali passagio ad Terram Sanctam, tunc dabitur ei dilatio trium annorum & quindecem dierum, & quatuor, ut prædictum est. Et si aliquis infra tempus illud feoffatus fuit à disseysitore, si verus dominus reversus eum incōtinenti ejiciat, non recuperabit per assisam: quia tēpus tale, licèt longum fuerit,

Britton, ii. ch. xiii. § 3.

Fleta, 216.

f. 163 b.

returned he should be prohibited from entering or be repelled or believes that he will be repelled. But if he has been absent from whatever necessary cause of common business, or of a journey, or from any other cause, it will be requisite to distinguish the distance of places and the times, or the diligence or the negligence of the person disseysed, according as he has been near in the same county, or far off in another county, or elsewhere provided he is within the realm. Let "far" and "further" be distinguished, at what time he could have known concerning disseysine, and not the time at which he did know it, and in which case reasonable days' journeys are to be computed for him in coming, so that, reasonable delays having been allowed to him, within the fourth day or further upon special cause as above explained he may expel the disseysor, which will be sufficiently immediate, since time does not run against him except from the time of his knowledge, and from which after knowledge he could come conveniently. But if he be beyond the realm on a simple pilgrimage, as to St. James (of Compostella), or in the service of the lord the king by chance in Gascony, he shall have a delay of forty days and two floods and one ebb, because he is beyond the sea, and in a similar manner a space of fifteen days after he has come within the realm, and further of four f. 163 b. days that he may rally his forces, &c. But if he should be beyond the realm on a simple pilgrimage in the Holy Land, then there shall be allowed him the delay of a year beyond the realm and of fourteen days and four days within the realm, as aforesaid. But if on a general passage to the Holy Land, then there shall be allowed him a delay of three years and fifteen days and four as aforesaid. And if any one has been enfeoffed during that time by the disseysor, if the true owner on his return shall eject him forthwith, he shall not recover by an assise, because such time, although it be long, is not to be computed against the absent person: therefore a person

non est computandū absenti: & ideò taliter feoffatus sibi imputare poterit, nisi priùs medio tempore sibi per breve de warrantia prospexerit. Omnes autem, qui morā faciunt longiorem quoad restitutionem, incontinenti seysinam suam dedisse videntur oblivioni. Provideant igitur sibi, illi qui voluerint rejicere incontinenti flagrante disseysina, quòd injuriam disseysinæ per patiētiam, dissimulationem, negligentiam, impotentiam, desperationem, vel negligentem impetrationem non tepescant, per quod amittant utramque possessionem, naturalem videlicet & civilem, & disseysitor utramque habere incipiat, ita quòd sine judicio ejici non possit quasi incontinenti. ¡Qualiter autem quis ejici debeat, incontinenti videndum erit per exemplum, & cui competit assisa, & cui non, quia incontinenti: ut ecce. Ejicio te de libero tenemento tuo, viribus & non judicio, competit tibi remedium per assisam ut infrà. Item ejicio te, & tu me incontinenti flagrante disseysina, non recuperabo per assisam, quia passus sum id, quod feci. Item ejicio te, & tu me incontinenti, & ego te posteà incontinenti iterum, adhuc competit tibi assisa contra me ad seysinam recuperandam, & ita erit in infinitum, quòd verus possessor ejicere poterit incontinenti, & non competit contra ipsum assisa, & si ipse iterum à spoliatore incontinenti ejiciatur, poterit spoliatorem rejicere, & non competet spoliatori assisa: quia quod facit, passus est. Si autem verus possessor negligens erit post disseysinam, & negligens impetrator, patiens, & dissimulans injuriam, impotens omnino, vel de potentia sua desperans, ut prædictum est, ita quòd utramq; amisit possessionem, naturalem videlicet & civilem, non succurritur ei nisi per assisam. Et si fortè assisam contemnat, & possessionem suam

so enfeoffed must lay blame to himself, unless in the interval previously he has provided for himself by a writ of warranty. But all persons who make a longer delay as far as restitution goes, seem forthwith to have given their seysine to oblivion. Let them therefore provide for themselves, those who wish to repel [an intruder] forthwith whilst the disseysine is burning hot, lest they allow the injury of the disseysine to grow tepid by their patience, or dissimulation, or negligence, or powerlessness, or despair, or neglect to beg assistance, by which they may lose both kinds of possession, the natural forsooth and the civil, and the disseysor may commence to have both, so that he cannot be ejected as it were forthwith without a judgment. But in what way a person may be ejected forthwith, will be seen by an example, and who is entitled to an assise, and who not, because forthwith: as for example. I eject you from your freehold, by force, and not by a judgment, you are entitled to a remedy by an assise, as below. Likewise I eject you, and you eject me forthwith whilst the disseysine is burning hot, I shall not recover by an assise, because I have suffered that which I have done. Likewise I eject you, and you eject me forthwith, and I afterwards eject you a second time forthwith, you are still entitled to an assise against me to recover seysine, and so it will be to infinite time, that the true possessor may forthwith eject, and no assise lies against him, and if he be forthwith ejected a second time by the spoiler he may repel the spoiler and the spoiler will not be entitled to an assise, because he has suffered that which he has done. But, if the true possessor should be negligent after the disseysine and be a negligent claimant, patient, dissimulating his injury, powerless altogether, or despairing of his power, as aforesaid, so that he has lost both kinds of possession, the natural forsooth and the civil, there is no succour for him but through an assise. And if he by chance contemns an assise, and should presume to usurp

(viribus utens, non judicio) sibi usurpare præsumat, competit spoliatori propter usurpationem assisa, non quia injustè disseysitus sit, sed quia sine judicio, & quia per negligentiam veri domini utramq; habere incepit possessionem, naturalem videlicet & civilem. Et si verus dominus habere velit regressum, vix aut nunquā audietur, nisi tantùm super proprietate, si autem velit ad assisam recurrere, quæ ei primò competebat, non poterit: quia assisam demeruit & gratiam juris, & quia frustra legis auxilium invocat, qui in legem committit: lex enim se ei gratis obtulit, quam quidem recusans, usus est viribus & non lege, & ideò ei non subveniet, quia, cum potuit, noluit, & cùm velit, non poterit. Eodem modo respondebit ei minister legis & juris, cujus jurisdictionem minùs licitè sibi usurpavit. Item esto, quòd disseysitor, cùm disseysinam fecerit,
164. statim & eodem die vel in crastino rem spoliatam ad alium transtulerit ex quacunque causa, poterit ille, ad quem res translata est, incontinenti ejici à vero domino disseysito, sicut ipse primus & principalis disseysitor: quia verus dominus semper sibi retinuit civilem possessionem, quamvis naturalē amitteret. Eodem modo, si per assisam novæ disseysinæ velit agere, versus utrumque recuperabit, quia uterque fecit ei disseysinam principaliter, scilicet primus disseysitor abstulit ei naturalem possessionem, & secundus civilem, & uterque conjunctus cum alio, simul abstulit ei utramque, civilem scilicet & naturalem, & unde neuter eorum sine alio respondebit. Sed unus, scilicet primus, tenetur ex

his possession, using force and not a judgment, the spoiler is entitled to an assise on account of the usurpation, not because he has been unjustly disseysed, but because he has been disseysed without a judgment, and because through the negligence of the true owner he has begun to have both kinds of possession, the natural forsooth and the civil. And if the true owner wishes to have a re-entry, he shall rarely or not at all be heard, except on the question of the property, but if he wishes to have recourse to an assise, to which he was at first entitled, he will not be able, because he has ceased to deserve an assise and the grace of the law, and because he invokes in vain the aid of right, who acts against the law; for the law offers itself to him gratuitously, which indeed refusing, he has had recourse to force, and not to the law, and therefore the law will not come to his aid, because, when he could, he would not, and when he shall be willing, he shall not be able. To the same effect the minister of the law and of right, whose jurisdiction he has usurped illicitly, will answer him. Likewise let it be that the disseysor, when he has made a disseysine, immediately and on the same day or on the morrow has f. 164. transferred the spoil to another person, for whatever reason, he, to whom the thing has been transferred, may be forthwith ejected by the true owner, who has been disseysed, just as the first and principal disseysor may be; because the true owner has always retained for himself the civil possession, although he may have lost the natural possession. In the same manner, if he wishes to proceed by an assise of novel disseysine, he will recover against either, because each has effected a disseysine against him in the character of a principal, for instance the first disseysor has taken from him the natural possession, and the second the civil possession, and each conjointly with the other has taken away at the same time both, the civil forsooth and the natural, and hence neither of them shall answer without the other. But

disseysina tantùm ad pœnam & non ad restitutionem, quia non habet rem, quam restituere debet. Secundus verò tenetur ad utrumque, tam ad pœnam quàm ad restitutionem: ad pœnam quia abstulit civilem possessionem, & ad restitutionem, quia habet rem quæ debet restitui. Secus autem est, si res post disseysinam per longum intervallum transferatur ante impetrationem brevis, & ubi primus & principalis disseysitor tantùm tenetur ad pœnam propter injuriam, & ille, ad quem res p intervallum translata fuerit, tantùm ad restitutionem secundùm virtutē assisæ, ut infrà dicetur. Item esto, quòd primus disseysitor post disseysinam statim ab alio fuerit disseysitus, poterit verus dominus, si voluerit, ultimum disseysitorem incontinenti dejicere, sed non post intervallum, supradicta ratione. Et eodem modo, si per assisam velit agere, poterit versus utrumq; recuperare. Si autem ad tempus dissimulaverit, poterit ille primus disseysitor versus suum disseysitorem recuperare, si agere velit per assisam. Posset etiam ab initio eum incontinenti rejicere, ut infrà de transgressionibus, ubi plus de hac materia, sine regressu aliquo, quem ille secundus disseysitor habere poterit. Item quæritur de recenti rejectione, an vicecom̃ debeat se intromittere? videtur quòd sic, quāvis quidam dicunt contrarium, sed ad certum tempus & non imperpetuum, nec debet se ingerere ex officio suo, nisi hoc postulet disseysitus, quia si fecerit, cadit in assisam. Item videre debet vic.[1] utrum violentia, pro qua requiretur, si fuerit requisitus, justa sit vel injuriosa: si autem injuriosa, se non intromittat ad alicujus instantiam, ne incidat in assisam, ut si aliquis alium disseysiverit injustè, & disseysitus ad hoc nitatur, ut disseysitorem suum incontinenti dejiciat: si

[1] "Vicecomes, cum fuerit requisitus, utrum violentia, pro qua requiritur justa sit." MS. Rawl. C. 160.

one, for instance the first disseysor, is liable from the disseysine only to a penalty, and not to restitution, for he has not the thing which he ought to restore. But the second is liable to both, as well to a penalty as to restitution, because he holds the thing, which ought to be restored. It is otherwise however, if a thing after a disseysine during a long interval should be transferred before the obtainment of a writ, and when the first and principal disseysor is only liable to punishment on account of an injury, and he, to whom the thing has been transferred after an interval, is only liable [to make] restitution in accordance with the efficacy of the assise, as will be explained below. Likewise let it be that the first disseysor immediately after the disseysine has been disseysed by another, the true owner, if he wishes, may expel the last disseysor forthwith, but not after an interval, for the reason stated above. And in the same manner if he should wish to proceed by an assise, he may recover against either. But if he has dissembled for a time, the first disseysor may recover against his own disseysor, if he wishes to proceed by an assise. He might also from the commencement expel him forthwith, as will be explained concerning trespasses, where there will be more on this subject, without any re-entry, which the second disseysor could have. Likewise it is questioned concerning a recent expulsion, whether the viscount should intermeddle? It seems so, although some say the contrary, but for a certain time only, and not for ever; nor ought he to interfere officially, unless the person disseysed demands this, because if he should do so, he falls into an assise. Likewise the viscount ought to see whether the violence, for which his aid is required, if it should be required, be just or injurious, but if it be injurious, let him not intermeddle at any person's instance, lest he fall into an assise, as if any one has disseysed another unjustly, and the disseysed party strives for this object, that he may expel his disseysor

vicecomes vim disseysiti, quæ justa est amoveat, & vim disseysitoris injuriosam sustineat, cadit similiter in assisam. Item cùm quis venerit, ut justè possidentem p̄ vim dejiciat, cùm possidens in possessione se viriliter agat & se defendat, & vic. vim & invasoris injuriā sustineat, cadit similiter in assisam. Sed vice versa, cùm vic. justè possidentem in sua possessione defendat, vel cùm justè possidens ejectus fuerit, & incontinenti nitatur possessionē suā resumere, & vicecom̄ cùm rogatus fuerit, & quamdiu licuerit, vim talem sustineat, cùm justa sit, hoc ei licebit, s. quamdiu justè possidens civilē habuit possessionē, & donec amissa fuit per negligentiam, impotentiam, vel desperationē: in quo casu, vic. ulteri⁹ se non intromittat
b. 164 b. etiā rogatus, ne incidat in assisam. Hæc autem oĩa facere potest vel ut amicus, vel ut vic. ex officio suo, pro pace dn̄i regis. Et in fine notandum, q̄ talis rejectio incontinenti facienda, continua esse debet & non distincta p̄ temporum intervalla, ut si quis injustè disseysitus fuerit, assumptis viribus debet disseysitorem incontinenti rejicere si possit, si autem non, non debet inde recedere, sed continuè pulsare: quia qui semel per impotentiam recesserit, utramq̄ amittit possessionem, quia post tempus redire non potest ad dejiciendum, nec seysinam quam sic amisit pro voluntate sua resumere, cùm jam ad manus superioris fuerit devoluta cognitio. Oportet igitur de necessitate ad superiorem recurrere, sicut, inferiùs apparebit. Hæc autem ad p̄sens de rejectione incontinenti dicta, sufficiant exempli causa.

forthwith: if the viscount removes the force of the disseysor which is just, and sustains the force of the disseysor which is injurious, he falls equally into an assise. Likewise when any one has come, that he may expel by force a just possessor, when the possessor in possession conducts himself manfully and defends himself, and the viscount sustains the violence and injury of the invader, he falls similarly into an assise. But conversely, when the viscount defends a just possessor in his possession, or when a just possessor has been ejected and he strives forthwith to resume his possession, and the viscount, when he has been asked, and as long as it be allowable, sustains such force, when it is just, this will be allowed, that is, as long as the just possessor has civil possession, and until it has been lost from negligence, feebleness, or despair: in which case let not the viscount intermeddle any further, even if asked, lest he fall into an assise. But all these things he may do either as a friend, or f. 164
officially as viscount, for the maintenance of the peace of the king. And finally it is to be noted, that such an expulsion to be made forthwith, ought to be continuous and not at distinct intervals of time, as if a person has been unjustly disseysed, having collected his forces he ought forthwith to expel the disseysor, if he can, but if not, he ought not to withdraw, but to knock continuously; because he who once from feebleness has retired, loses both kinds of possession, for he may not return after a time to eject [the invader] nor to resume seysine, which he has thus voluntarily lost, since the cognisance has devolved to the hands of his superior. It is requisite therefore of necessity for him to have recourse to his superior, as will be apparent below. But thus much for the present will suffice for example's sake on the subject of immediate expulsion.

Cap. VI.

1. Quod oportet de necessitate ad superiorem recurrere, ubi non poterit disseysitus per se disseysitorem suum incontinenti rejicere, et fiat ei ibi breve de nova disseysina.

Dictum est suprà, qualiter disseysitus poterit disseysitorē suū incontinēti rejicere impunè & sine brevi, quamdiu retinuerit civilem possessionē. Nunc autem dicendum, qualiter recurritur ad superioris auxilium, cū utrāque amiserit possessionem, naturalem videlicet & civilem. Cùm igitur disseysitus, ita negligens fuerit in hac parte, q nolit vel non possit disseysitorē suum rejicere, de beneficio principis succurritur ei per recognitionem assisæ novæ disseysinæ, multis vigiliis excogitatam & inventam, recuperandæ possessionis gratia, q disseysit^{o} injustè amisit & sine judicio, ut per summariā cognitionē absq; magna juris solēnitate, quasi p cōpendiū negotiū terminetur.

2. In quibus locum habet hujusmodi assisa. Britton, l. ii. ch. xi. § 1. Fleta, 214.

Locū autem non solū habet hujusmodi assisa in rebus corporalib^{o}, sicut in tenementis quibuscunq;, verū etiā in rebus incorporalib^{o}, sicut in servitutibus & in reb^{o} quæ ptinent ad tenementū, sicut in jure pascendi, falcandi, fodiendi & hujusmodi: sicut inferiùs apparebit.

3. De triplici effectu hujusmodi assisæ.

Est autē ista recognitio sive assisa triplex, & pœna multiplex, ut infrà de restitutiōe dānorū: est enim psonalis, quia psequitur eum, qui fecit disseynā, ppter factū quia ipse fecit, psequitur etiā eū ad pœnā ppter injuriā, psequitur etiā rem, quoad restitutionē, & in hoc est rei psecutoria. Persequitur etiā quādoq; unicā psonā, quantum ad hæc omnia, & quandoq; duas psonas vel plures, secundùm quod duo fuerint disseysitores principales vel plures, & secundū quod res ad ipsos pervenerit p ipsam disseysinam, vel post disseysinā per translationē statim vel post tempus. Persequitur etiam quandoq; unicam psonā quantū ad pœnā ppter factum & injuriam, & aliam psonam quantū ad rei

Chapter VI.

We have discussed above ,how a disseysed person may forthwith expel with impunity his disseysor, as long as he retains civil possession. We must now discuss how recourse is had to the aid of a superior, when he has lost both kinds of possession, the natural forsooth and the civil. When therefore a person disseysed has been so negligent in this part, that he unwilling or unable to expel his disseysor, from the bounty of the prince succour is afforded him by an assise of novel disseysine, contrived and invented after many vigils, with the object of recovering the possession, which the party disseysed has lost unjustly and without a judgment, that by summary cognisance without much juridical solemnity the business may be terminated, as by a short cut.

1. That it is requisite of necessity to have recourse to a superior, where the party disseysed cannot expel his disseysor forthwith, and let there issue to him a writ of novel disseysine.

But this kind of assise has a place not only in the case of corporeal things, as in tenements of any kind, but also in the case of immovable things, as in servitudes and in things which appertain to tenements, as in the right of pasture, of cropping, of digging, and such like, as will appear below.

2. In what places an assise of this kind is held.

But this recognition or assise is threefold, and the penalty manifold, as [will be stated] below concerning the restitution of losses. For it is personal, because it pursues him, who made the disseysine, on account of the act which he has done; it also pursues him for punishment's sake on account of the injury; it also pursues the thing itself with a view to restitution, and so far it pursues the thing. It pursues sometimes a single person with a view to all these objects, and sometimes two persons and sometimes more, according as there have been two principal disseysors or more, and according as the thing has come to them by the disseysine itself, or after the disseysine by transference forthwith or after a time. It pursues also sometimes a single person for punishment on account of the act and the injury, and another person

3. Of the threefold effect of this kind of assise.

restitutionem cùm rem detineat, quarū nulla sine alia poterit respondere ꝑ se, quia disseysitor non habet quod restituat, licèt teneatur ad pœnam, nec ille qui rem detinet, licèt possit restituere, ullam injuriam fecit: conjunctis igitur utrisque personis in unam, tunc demùm procedatur per assisam, & non aliter. Perse-
f. 165. quitur etiam quandoque plures personas quātū ad pœnā, & plures quantū ad rei restitutionem, secundùm q̄ res in plures man^{2} devenerit post disseysinā, vel secundū q̄ in plura capita in ipsa disseysina divisa fuerit & partita. Acquiritur verò ꝑ assisam istam non solùm ipsa res spoliata corporalis, verùm etiam omnes fructus medio tempore percepti, cui competit querela. Item non solum ipsa res, sed in ipsa re pax & quies. Item non solùm pax & quies in ꝑprio, sed libertas & perturbationis evacuatio, de quibus mentio facta est in principio.

Cap. VII.

1. Cui competit assisa. Item, quoniam ad omnes non pertinet hujusmodi querela, quamvis in possessione fuerīt, videndum est igitur cui cōpetat remedium ꝑ assisam, & ad quem pertineat querela, & cui fieri debeat, & quando, & similiter ad quem non pertineat, & sciendum q̄ tantùm pertinet ad eos querela, qui nomine suo proprio tenementum tenent & non alieno, sive ad vitam, sive in feodo & non ad terminum annorum, licèt aliud habeat remedium: & quicunq̄ sint tales, masculus vel fœmina, major vel minor, liber vel servus, in suo casu, & sive ꝑ se in propria persona sive per procuratorem vel familiam, vel firmarium, vel alios quoscunque, qui suo

as regards the restitution of the thing, when he detains it, of whom none without the other can reply by himself, because the disseysor has not anything to restore, although he is liable to punishment, nor has he who detains the thing done any injury, although he can restore it: after both persons therefore have been joined into one, then let proceedings be taken by an assise, and not otherwise. It pursues also sometimes several persons for punishment, and several persons for restitution of the thing, according as the thing has passed into several hands after the disseysine, or according as it has been divided and partitioned into several heads on the disseysine itself. But by an assise of this kind there is acquired for the person who is entitled to make complaint not merely the corporeal thing itself, of which he has been despoiled, but also all the fruits meanwhile derived from it. Likewise not only the thing itself, but also peace and quiet. And not only peace and quiet, but liberty and relief from all disturbance, about which mention has been made at the beginning. f. 165.

Chapter VII.

Likewise since not every person, although he may be in possession, is entitled to a complaint of this kind, we must accordingly see, who is entitled to a remedy by an assise, and to whom the complaint appertains, and to whom it ought to be made, and when, and similarly to whom it does not appertain: and it is to be known that the complaint only appertains to those who hold a tenement in their own name, and not in another's name, whether for life, or in fee, and not for a term of years, although he may have another remedy; and whoever are of this description, whether male or female, major or minor, free or a serf, in their own case and either by themselves in their own person, or by an agent or a household or a farmer, or any other persons whatsoever, who have been in

1. Who is entitled to an assise.

nomine fuerint in seysina, cùm per tales possideant, quia ille possidet cujus nomine possidetur, & unde si quis tales, qui nomine dominorum suorum fuerint in seysina, ejecerit, domino competit assisa & non illis, ut inferiùs dicetur ad exemplum. Nulli autem competit, qui in seysina fuerit nomine alieno, quia talis non possidet, licèt fuerit in seysina, sicut procurator, vel custos ratione custodiæ, firmarius sive usufructuarius ratione firmæ, servus proprius vel alienus, hospes vel alius quicunq;, talibus enim non cōpetit assisa, cùm nomine dominorum sive aliorum extiterint in seysina, sed querendum est de eo, qui seysinam injustam habuerit p disseysinā, vel intrusionem, & ab eo disseysit[9] fuerit, qui jus non habet. Item si à non domino feoffatus fuerit, & ita ab eo qui jus non habet disseysitus, an ei competat querela & remedium p assisam? videtur prima facie quòd non, cùm disseysitor p se habeat contra assisam, ut videtur, sufficientem exceptionem, vz. quòd disseysitus non habuit nisi teneram seysinam, vel quòd habere non potuit, propter injustum initium, feodum nec liberum tenementum. Sed revera licèt talis injustè possidens nullam haberet actionem contra veros dominos, habebit tamen querelam & remedium per assisam contra tales, qui jus non habent, propter cōmodum possessoris, & ipsi contra tales nullam habebunt exceptionem teneræ seysinæ, vel liberi tenementi. Propter cōmodum possessoris dico, quia si tales, qui jus non habent, extra seysinam peterent, nunquam recuperarent versus possidentem, quamvis injustè, cùm actionem competentem non haberent, & ita remaneret suo loco possessio. Et cùm neuter illorum jus habeat, nec feodum, nec liberum tenementum, tamen pro primo possessore judicandum

seysine in their own name, since through such persons they possess, because he possesses, in whose name possession is held, and hence if any one has ejected such persons as are in seysine in the name of their lords, the lord is entitled to an assise, and not the parties ejected, as will be explained below. But it is not competent for any one who has been in seysine in another person's name, because such an one does not possess, although he may be in seysine, as an agent or a keeper by reason of custody, a farmer or an usufructuary by reason of a farm, one's own serf or another's serf, a guest or any one else, for such persons are not entitled to an assise, since they have been in seysine in the name of the lords or of others, but it is questionable concerning him, who has had an unjust seysine through disseysine or intrusion, and has been disseysed by him, who has no right. Likewise if he has been enfeoffed by one, who was not the lord, and so by him, who, when disseysed, had no right, whether he is entitled to a complaint and remedy by an assise? It seems at first sight not, since the disseysor has on his behalf a sufficient exception, as it appears, against an assise, to wit, that the party disseysed had only a tender seysine, or that he could not have, on account of an unjust beginning, the fee or the freehold. But in truth, although such an one unjustly possessing would have no action against the true lords, he will however have a complaint and remedy by an assise against such as have no right, to the benefit of the possessor, and they will have against such persons no exception of a tender seysine or of a freehold. To the benefit of the possessor, I say, for if those who have no right should claim being out of seysine, they would never recover against a person possessing although unjustly, since they would have no competent action, and so the possession would remain in its place. And since neither of them has any right, nor the fee, nor the freehold, nevertheless judgment will have to be given for the

erit, propter seysinam primam, ex quo ille qui secundò
f. 165 b. primū possessorē ejecit, nullū jus habuit ejiciēdi, &
Britton, l. ii. ch. xi. § 8. quia res posset semper cū eo remanere ꝑ negligentiam
veri dñi, & hoc ꝑpter cōmodum possidendi. Cùm igi-
Fleta, 216, 217. tur actionē nō habeant, & talē (quamvis injustè possidentē) disseysiverint, cùm ꝑ judicium recuperare non possent, si talis petat ꝑ assisam, licèt ei de jure non cōpetat, tamen in odiū disseysitoris ꝑcedit, quia p̃dicti disseysitores nullā contra ipsum habere possunt exceptionē. Item competit remediū ꝑ assisam & querela ei, qui ꝑ se titulū habuerit ad tēpꝰ, simul versus oēs à quocunqꝫ feoffatus fuerit, dño vel non dño, & versus eū qui jus nō habet, & eum qui jus habet: ut si quis à non dño, custode, vel firmario ad certū termiñ tenuerit annoꝝ, vel ab eo qui ingressum habuerit ꝑ disseysinā, vel intrusionē, si taliter feoffatꝰ ꝑ aliquod tēpus in pace tenuerit, à vero dño ejici non poterit sine brevi & judicio, dū tamē tale sit tēpꝰ, q̄ sufficere possit ꝑ titulo. A non dño verò, cū titulum ab eo habeat, ejici non potest, ꝑpter titulum, & feoffamentū, & ꝑpter factū suū, licèt tempꝰ non interveniat, nec etiā ab eo qui jus non habet, licèt non interveniat titulus, nec tēpus, sed à vero dño ejici poterit & impunè, si tempꝰ q̄ sufficiat ꝑ titulo nō intervenerit. Itē cōpetit ei remedium & restitutio ꝑ assisam, quia omnino sine aliquo titulo in seysina fuerit ꝑ disseysinā vel intrusionem, q̄ sine judicio disseysitus, dum tamen tempus habeat q̄ sufficiat ꝑ titulo, versus omnes sive jus habeat sive non, & ita juvat possessionem aliquando tempus sicut titulus. Item competit ei que-

first possessor, on account of his first seysine, since he, who in the second place ejected the first possessor, had no f. 165 b. right of ejectment, and because the thing might always remain with him through the negligence of the true lord, and this on account of the benefit of possession. Since therefore they have no action and have disseysed such an one (although possessing unjustly), when they could not recover by a judgment, if such a person claims by an assise, although he is not entitled to it of right, nevertheless it proceeds in hatred of the disseysor, because the aforesaid disseysors can have no exception against him. Likewise a complaint and a remedy by an assise are competent to him, who has a title for a term, at the same time against all by whomsoever he has been enfeoffed, by the lord or non-lord, both against him who has no right, and against him who has right; as if any one is a tenant for a certain term of years under a non-lord, the keeper or farmer, or under a person who has had an entry by a disseysine or an intrusion, if such person having been enfeoffed has held it some time in peace, he cannot be ejected by the true lord without a writ and a judgment, provided however it be such a time, as would suffice for a title. But he cannot be ejected by a non-lord, when he has his title from him, on account of the title and the feoffment, and on account of his own act, although time does not intervene, nor even by him who has no right, although neither a title nor time intervenes; but he may be ejected by the true lord and with impunity, if time, sufficient for a title, has not intervened. Likewise he is entitled to a remedy and to restitution by an assise, should he have been in seysine without any title by disseysine or intrusion, because he has been disseysed without a judgment, provided he has time which is sufficient for a title against all persons, whether he has right or not, and so time sometimes assists possession as a title. Likewise he is entitled to a plaint and

rela & remedium p assisam, licèt ejectus non fuit psonaliter in ppria persona, vel p procuratorem, sed cùm nemine relicto in seysina à seysina recesserit, & cùm reversus fuerit non admittatur vel repellatur. Item cōpetit ei querela & remediū p assisam, si quis in alieno uti voluerit, cùm jus non habuerit, & contra dñi voluntatem, & eodē modo si dominū non pmisit uti in suo, ut supradict' est in principio. Item cōpetit ei querela & remediū p assisam, si quis disseysitus fuerit ab aliquo per judicium, q tamen sit injustum. Item competit ei querela & remedium p assisam, qui furiosus est vel mente captus, sicut ei qui est sanæ mentis, dum tamen in acquisitione tenementi habuerit sanam mentē: quia ex quo semel, dum sanæ mentis extiterit, animū habuerit retinendi, in ipso furore (si supervenerit) animum mutare non poterit nec desinere possidere, quia consentire non potest nec dissentire, nec desinere possidere, & ideò amittere non potest per aliquem cursum temporis id, q tempore prospero vel dilucidis intervallis acquisiverit. Item competit remediū tā ei qui feodi firmarius est, quàm ei qui tenet in feodo vel ad vitā. Et eodē modo competit ei qui tenet in sokagio p certū redditū, sicut ei qui tenet p servitiū militare. Itē cōpetit uxori de re sibi data & tradita à viro vel
f. 166. è contrario cōstāte matrimonio, quāvis donū irritari
Britton, l. ii. ch. xi. § 9. possit ex postfacto. Sed, si qui ipsorū post mortē donatoris in seysina fuerint, sine judicio disseysiri non
Fleta, 214, 216. possunt, dū tñ tempus quod alibi sufficere possit pro titulo intervenerit. Item competit ei actio, cujus pater obiit in statu libero, si post mortem patris fuerit in seysina & in possessione libertatis, extra dominorum potestatem. Item quandoq cōpetit villano sockmanno in dominico dñi regis, si manerium voceť burg°, sicut

a remedy by an assise, although he has not been personally ejected in his own person or through his agent, but when no one having been left in seysine he has withdrawn from seysine, and when he has returned, he is not admitted or is repelled. Likewise he is entitled to a plaint and a remedy by an assise, if any one has wished to make use of another person's property, when he had no right to it, and against the will of the lord, and in the same way if he has not permitted the lord to make use of his own, as has been said above at the beginning. Likewise he is entitled to a plaint and a remedy by an assise, who is a madman or insane, just as he who is of sane mind, provided he had a sane mind in the acquisition of the tenement, because since once, when he was of sane mind, he had the intention to retain it, he cannot change his intention whilst he is in a state of madness (provided it has supervened), nor cease to possess, because he cannot consent nor dissent, nor cease to possess, and therefore he cannot lose by any length of time that, which he has acquired at a prosperous moment or at lucid intervals. Likewise he who is the farmer of a fee has as well a remedy, as he who holds in fee or for life. And in the same way he is entitled who holds in sockage for a certain rent, as he who holds for military service. Likewise a wife is entitled for a thing given and delivered to her by her husband or the contrary during matrimony, although f. 166. the gift may be rendered void ex post facto. But if any of these persons have been in seysine after the death of the donor, they cannot be disseysed without a judgment, provided however time, which would be sufficient elsewhere for a title, has intervened. Likewise he is entitled to an action, whose father has died in a free state, if after the death of his father he has been in seysine and in possession of freedom, beyond the power of lords. Likewise sometimes a villein sockman in the demesne of the lord the king is entitled, if the

Cirencestr̃: ut de itinere abatis[1] de Radinge, & M. de Pateshul in com̃ Glocester, anno regni Hen.[2] quinto, assisa novæ disseysinæ, si Philippus le Riche. Item competit libero homini, qui tenuerit villenagium p̱ servitium & cōsuetudines villanas, sive copulatus fuerit villanæ vel non, de tenemento q̱ alibi tenuerit liberè, eo non obstante, q̱ tenuerit villenagium & copulatus fuerit villanæ. Item competit ei, qui feoffatus est per aliquem, qui tenuerit ad vitam sive nomine dotis, sive p̱ legem Angliæ vel ad terminum vel alio quocunq̱ modo, ut in multis locis probatur per exemplum. Item competit villano in suo casu, versus dominum & omnes alios, dum fuerit extra potestatem dominorum, donec dominus eum ejecerit ut servum. Si autem sub potestate dominorum & feoffatus fuerit, sive à domino sive ab extraneo, competit ei assisa versus omnes. Si autem tantùm ab extraneo, competit ei assisa contra omnes de mundo, p̃terquā contra verum dominum, sub cujus fuerit potestate, si fortè velit eum disseysire. Item competit ei, qui tenemētum tenuerit, donec ei provideatur, sicut aliis qui liberum habent tenemētum, quia bene potest esse, q̱ nunquam ei providebitur, & sic poterit remanere in feodo tale tenementum. Item competit assisa, ut si duobus facta fuerit donatio successivè, & diversis temporibus, & uterq̱ se simul posuerit in seysina sine warranto, & donator ratam habuerit alterius seysinam, & alterius non, sed si ille, cujus seysina rata non erat, ejectus fuerit, non recuperabit. Si autem utriusque, hoc stare non poterit, sed proprietas erit præferenda, ac si uterq̱ ingrederetur cum warranto. Si autem unus ingrediatur cum warranto & alius sine, ille cum warranto

Britton, l. ii. ch. xi. § 21.

[1] "Abbatis." MS. Rawl. C. 160. | [2] "Regis Henrici," *ibid.*

manor be called a borough, as Cirencester, as in the iter of the abbot of Reading and Martin de Pateshull in the county of Gloucester in the fifth year of the reign of Henry, an assise of novel disseysine, if Philip le Riche. Likewise a free man is entitled, who has held a villenage by service and villein customs, whether he is coupled to a villein woman or not, concerning a tenement which he has held elsewhere freely, notwithstanding the fact, that he has held a villenage and is coupled to a villein woman. Likewise he is entitled who has been enfeoffed by any one who held it for life, or in the name of dower, or by the law of England, either for a term or in any other way, as is proved by example in many places. Likewise a villein is entitled in his own case against his lord and against all others, provided he is beyond the power of his lords, until the lord has ejected him as a serf. But if he be under the power of lords and has been enfeoffed, whether by the lord or by a stranger, he is entitled to an assise against all persons. But if only by a stranger, he is entitled to an assise against all the world, except the true lord, under whose power he may be, if he should wish to disseyse him. Likewise he is entitled, who holds the tenement until provision is made for him, as for others who hold a free tenement, because it may well happen that provision will never be made for him, and so such a tenement may remain in fee. Likewise he is entitled to an assise, as if a donation has been made to two persons successively and at different times, and each has put himself into seysine at the same time without a warrant, and the donor has ratified the seysine of the one and not of the other, but if he, whose seysine has not been ratified, has been ejected, he shall not recover. But if of each, this cannot stand, but the property will have to be preferred as if each entered with a warrant. But if one entered with a warrant, and the other not, he with the warrant is preferred, and he is entitled to

præfertur, & ei competit assisa. Item si duo se gerant pro hærede & de eorum jure dubitetur, in hoc dubio ei competit assisa, qui se pri^{9} posuerit in seysinā, nisi in veritate cōstare possit talē jus non habere. Si autē duo contendant de hæreditate, quorū null^{9} jus habuerit, ut si ambo fuerint bastardi, cōpetit ei assisa qui priùs fuerit in poss. cū warranto vel sine, donec ali^{9} ejecerit qui jus habuerit qualecunq. Si autē unus bastardus & alius legitimus, vel un^{9} servus & alius liber, cōpetit ei assisa qui jus habet, si ille qui fuerit in seysina longū tempus habuerit & pacificū, q sine judicio ejici non possit. Quid etiam si tale tēpus non habuerit? per assisam non recuperabit.

2. Si facta fuerit donatio viro et uxori simul, qui habent quasi jus unum, vel aliis duobus simul in communi.

Item videtur incontinenti ejecisse, si quis ita tenementum dederit sub conditione, quæ dependet de futuro, ut si dicat, Do tibi tantam terram si filiam meam, vel ut filiam meā ducas in uxorem, si facta donatione & subsecuta traditione, talis, licèt per longum tempus posteà, ad alia vota cōvolaverit, & aliā in uxorem duxerit, si ejiciatur etiam sine judicio, per assisam non recuperabit: quia si res ob causam data fuerit & sub conditione, quæ sic dependet de futuro, licèt ab initio perfecta sit, tamen causa non secuta, resolvitur donatio per conditionem, & ita incipit esse nulla, quia conditioni non est satisfactum. Sed posset opponi, q si statim non posset conditioni satisfieri, post mortem mulieris, quā primò contra conventionem traduxit, posset satisfieri, & sic fieri posset in multis donationibus sub conditione suspensis vel perfectis, sub conditione tamen resolvendis. Item sicut dejici poterit quis per

an assise. Likewise if two hold themselves out as the heir, and there is a doubt about their right, in this state of doubt he is entitled to an assise, who has first placed himself in seysine, unless it can be in truth established, that he has not such a right. But if two contend about an inheritance, neither of whom has any right, as if both be bastards, he is entitled to an assise, who has been first in possession with a warrant or without one, until another has ejected him, who has some kind of right. But if one be bastard and the other legitimate, or one a serf and the other free, he is entitled to an assise who has the right, if he who has been in seysine has had a long and peaceful time, so that he cannot be ejected without a judgment. What likewise, if he has not had such a time? He shall not recover by an assise.

2. If a donation has been made to a man and his wife together, who have as it were one right, or to two others together in common.

Likewise a person appears to have ejected forthwith, if he shall have so given a tenement under a condition, which depends on the future, as if he should say, I give you so much land, if you should marry my daughter, or in order that you may marry my daughter, if upon the donation having been made and delivery having followed, such an one, although a long time afterwards, has betaken himself to other vows, and has taken another woman for his wife, if he be ejected even without a judgment, he shall not recover by an assise, because if a thing has been given for a cause and under a condition, which so depends on the future, although it be complete from the beginning, nevertheless the cause not having followed, the donation is released by the condition, and so it begins to be null, because the condition has not been satisfied. But it may be objected, that if the condition could not be satisfied immediately, it might be satisfied after the death of the woman, whom he had first married contrary to the agreement, and so it might be done with many donations suspended or completed under a condition, to be released however under a condition. Likewise as a person may be driven forth by

f. 166 b. seipsum, & competit ei remedium per assisam, ita potest per familiā suam & alios, qui nomine suo extiterint in possessione, & quia sicut acquiritur possessio p eos quos quis in potestate habuerit & retinetur, ita poterit per suos amitti & retineri: ut si quis me dejecerit, meos autem non, non competit mihi assisa, quia per meos qui dejecti non sunt retineo seysinā. Sed si quis meos & me dejecerit, & quosdam retinuerit & vinxerit, vel eos ut servos suos retinuerit, competit mihi assisa, desii enim possidere cùm servi mei vel alii, per quos seysinam retinui, ab alio possidentur. Itē si expulsi non sunt tales, sed ab eo qui vi dejecit tenere ceperint, adhuc competit mihi assisa. Item si ego dejectus non fuero, in possessione tamen vinctus sum & impeditus quò min⁹ uti possim, adhuc competit mihi assisa. Item competit cuilibet, qui proprio nomine fuerit in seysina justè vel injustè: justè, ut si jure ꝑprio utatur, injustè, ut si in possessione fuerit per disseysinam, vel intrusionem, & si fuerit ejectus per aliquem qui jus non habuerit, competit ei restitutio p assisam, sicut ei qui jus habet adversus omnes, præterquā adversus verum dominū: quia licèt jus non habet, eo tamen, q in possessione ést, plus juris habet propter seysinam quā ille qui est extra possessionem, qui nihil juris habet, & eo maximè, quia si ille qui jus habet nunquam petat, sic poterit terra semper remanere cum disseysitore vel intrusore. Item si cùm antecessor meus ad firmam dederit tenementum & moriatur, & si in seysinam me posuero, salvo[1] firmario firma & termino suo, & de usu non impediaī, competit mihi assisa si ejectus fuero, licèt mihi uti non liceat, & valebit mihi seysina quoad liberum tenementum, &

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salva," MS. Rawl. C. 160.

himself, and he has a remedy by an assise, so he may be f. 166 b
by his family, and by others who have been in possession in his name, and because as possession is acquired by those, whom a person has in his power, and is retained, so it may be lost through his dependents and be retained: as if any one has driven me forth, but not my dependents, I am not entitled to an assise, because I retain seysine by my dependents, who are not driven forth. But if any one has driven me forth and my dependents, and has retained some and cast them into bonds, or has retained them as his serfs, I am entitled to an assise, for I cease to possess, when my serfs or others, through whom I have retained seysine, are in the possession of another. Likewise if such persons are not expelled, but begin to hold from him who has driven me forth by force, I am still entitled to an assise. Likewise if I have not been driven forth, but am in possession, bound however and impeded that I cannot make use of it, I am still entitled to an assise. Likewise anybody is entitled to it, who has been in seysine in his own name justly or unjustly; justly, as if he used his own right; unjustly, as if he should be in possession by disseysine or intrusion; and if he should be ejected by some one, who had no right, he is entitled to restitution by an assise, just as he who has right against all, except against the true lord: because although he has not any right, yet upon the fact that he is in possession, he has more right on account of his seysine, than he who is out of possession, who has no right, and for that reason chiefly, because if he, who has the right, should never claim, the land will in such case always remain with the disseysor or intruder. Likewise, if when my ancestor has let a tenement to farm and dies, and if I put myself into seysine saving to the farmer his farm and his term, and he be not impeded in the use of it, I am entitled to an assise, if I should be ejected, although I may not use it, and the seysine will be valid for me as regards the

non aufert firmario terminū suū, & si ultra terminum tenere ceperit firmarius, tunc primò mihi competit breve de termino qui præteriit, sicut antecessori meo competeret: si autem firmari[2] exceperit de feoffamento, tunc vertitur assisa in juratam ad inquirendum de feoffamento.

Cap. VIII.

1. Si fiat disseysina pluribus in re communi. Britton, l. ii. ch. xi. § 22. Fleta, 218.

Plures etiam disseysiri possunt in re communi, sicut & unus in propria persona, & competit eis querela & remedium per assisam. Communis autem esse poterit res sive tenementum multis modis, sicut res quæ communis est inter virum & uxorem, ubi neutri ipsorum sine alio competit querela vel assisa, cùm sint quasi unum corpus & diversæ animæ, & quasi unum jus habentes, nisi sit aliquis qui dicat, q̄ si vir uxorem disseysiverit vel è contrario, quòd assisa competit uni ipsorum quasi tenendam[1] in communi cum alia. Sed si ita esset, sic fieret divisio inter eos corporis & sanguinis, quòd esset contra hoc quod supradictum est. Videtur igitur quòd recurrendum sit ad curiam Christianitatis, ut discusso ibi de matrimonio, per censuram ecclesiasticam vel compellatur vir suscipere uxorē, vel uxor redire & sequi virum, & si opus fuerit, dominus rex ad supplicationem ordinarii in tenemento communicando quod suum fuerit exequatur. Poterit etiam esse tenementum cōmune inter duos vel plures, sicut sunt bundæ & metæ & rationabiles divisæ quæ ponuntur in terminis & finibus agrorum ad distinguendū f. 167. prædia & dominia vicinorum, quorum quilibet dominus est proprietatis, & non dominus in solidū, sed tamen

[1] "tenendum," MS. Rawl. C. 160.

freehold, and it does not take away from the farmer his term, and if the farmer begins to hold it beyond his term, then for the first time I am entitled to a writ concerning the term which has passed, just as my ancestor would be entitled; but if the farmer has excepted concerning the feoffment, then the assise is converted into a *jurata* to inquire into the feoffment.

Chapter VIII.

1. If several persons be disseysed of a common thing.

But several persons may be disseysed of a common thing, just as one in his own person, and they are entitled to a plaint and a remedy by an assise. But a thing or a tenement may be common in many ways, as a thing which is common between a man and his wife, where neither of them without the other is entitled to a plaint or assise, since they are as it were one body and different souls, and as it were having one right, unless there be some one who says, that if a man has disseysed his wife or the contrary, that one of them is entitled to an assise, as if of a tenancy in common with the other. But if it were so, there would thus be a division between them of body and blood, which would be contrary to what has been said above. It appears therefore that recourse must be had to the court of Christianity, that their marriage having been examined either the man be compelled by ecclesiastical censure to support his wife, or the wife to return and follow her husband; and if it be necessary, let the lord the king, upon the supplication of the ordinary, execute what is within his province in giving a common enjoyment of the tenement. A tenement likewise may be common amongst two or more, just as there are bounds and metes and reasonable dividing ridges which are set up in the boundaries and limits of lands to distinguish the holdings and ownerships of neighbours, each of whom is owner of the property, but not owner entirely, but nevertheless owner in common. f. 167.

Britton, l. ii. ch. xi. § 22. Fleta, 218.

dominus in communi. Talibus autem omnibus competit querela & remedū p assisā, secund q fuerit quilibet eoř disseysiti, s. ōnes vel quidā illoř, per extraneos vel seipsos inter se. Si quis igitur divisas araverit, lapidē vel arborē finalē amoverit & asportaverit, facit disseysinā, ut de itinere M. de Pateshul ad assisas novæ disseysinæ capiendas & gaolas deliberandas in coñ South: assisa novæ disseysinæ, si Radulphus de le Haye: quia ibi dicitur, quòd si quis terram meam araverit, & maximè qui divisas araverit inter me & ipsum, facit disseysinam: quia in hoc magis injuriatur, quàm si aliam terrā arasset, quia si aliam terram, tunc possent blada retineri, quod non est in divisis (ut videtur) quia hujusmodi metæ & bundæ sunt utriusq, vicinorum in communi quoad hoc, quòd nullus vicinorum aliquid sibi appropriare possit sine eo, quòd non facit disseysinam, ex quo tenent in communi. Sed q ibi poti^{9} sit transgressio quàm disseysina videtur, quia in visu faciendo juratoribus, non potest querens aliquā partē designare, nec dicere, Hæc pars mea est, quia divisæ non sunt p partes divisæ, sed jacēt in communi, quia nullus scit nec scire poterit partem suā. Si autē sit qui dicat, q illa pars dimidia sit alicujus quæ jacet ꝑpi^{9} juxta terram suam, hoc stare non possit, quia si quilibet araret vel prostraret partem dimidiam propinquiorem terræ suæ, ita consumi possent divisæ & adnihilari. Sed revera (quicquid dicant alii) videtur q ibi sit poti^{9} disseysina de tenemento in communi, & sic fiat visus de toto tenendū in cōmuni, de lapide verò & arbore finali idē est q liberū tenementum, ex quo lapis in terra fixus, quasi ædificiū solo

For all such are entitled to a plaint and remedy by an assise, according as each of them has been disseysed, to wit, all or certain of them, by strangers, or by themselves amongst themselves. If any one therefore has ploughed up the boundary ridges, has removed or carried away the stone or dividing tree, he has caused a disseysine, as in the iter of Martin de Pateshull to hold assises of novel disseysine and gaol delivery in the county of Southampton, an assise of novel disseysine, if Ralph de la Haye: because it is there said, that if any one has ploughed up my land, and chiefly if he has ploughed up the dividing ridges between me and himself, he causes a disseysine: because in this particular greater injury is done than if he had ploughed up other land, for if he had ploughed up other land, then the corn might have been retained, which is not the case in the dividing ridges (as it seems), because metes and bounds of this kind belong to each of the neighbours in common, so far as this, that none of the neighbours can appropriate any thing to himself without causing a disseysine, since they hold them in common. But that there is rather in that case a trespass than a disseysine seems from this, that in making a view for the jurors, the claimant cannot designate any part nor say, this part is mine, because the dividing ridges are not divisible into parts, but lie in common, because no person knows or can know his own part. But if there be any one who says that the half part which lies nearest to any one's land is his part, this cannot stand, because if each were to plough up or to level the half part nearest to his land, the dividing ridges might be consumed and annihilated. But indeed (whatever others may say) it seems that there is in this case rather a disseysine from a tenement in common, and so there should be a view of the whole tenement in common, but of the stone and boundary tree it is the same as a free tenement, since the stone being fixed in the ground belongs like a building to the ground, and a tree in a similar manner, after it has

cedit, & arbor eodē modo cùm radices egerit. Sunt autē quidā qui dicunt, q̄ amotio arboris & lapidis potī⁹ transgressio est q̄ disseysina, sed hoc non est verū, quāvis disseysina sub se contineat transgressionē, licèt non è contrario. Poterit etiā res esse communis inter plures, sicut inter cohæredes & participes in tenemētis cōmunibus, non partita hæreditate. Item inter vicinos in aliquo tenemento, q̄ aliquando fuit litigiosum & de communi voluntate relinquitur ad aliquē usum unum vel plures, si quis ex talibus participibus unum de participibus suis disseysiverit, idem habebit assisam versus participes suos tenendum in cōmuni. Si autem duos, quilibet habebit assisam suā p̄ se, quia diversæ sunt disseysinæ, & idem erit de pluribus in causa possessionis acquirendæ ante partitionē hæreditatis, cùm semel fuerit acquisita, & sunt ibi diversa jura, licèt de re incerta. In acquirenda verò seysina alicujus antecessoris in causa proprietatis, ubi diversæ sunt personæ & diversa capita, sed tamen quasi un⁹ hæres propter jus quod eis cōpetit, nullus potest sine alio petere seysinā antecessoris propinquam vel remotam, cùm sunt omnes quasi unus hæres p̄pter unicum jus. Cùm autem semel adita fuerit hæreditas & acquisita sive divisa fuerit inter capita sive non, nullus sine alio respondebit in causa proprietatis de seysina antecessoris, nec etiā in causa possessionis in assisa mortis antecessoris, ut infrà. De seysina verò propria, si ejectus fuerit particeps unus vel plures à participe
f. 167 b. vel participibus vel etiam ab extraneis personis, q̄uilibet habebit remedium p̄ assisam p̄ se sine participe, quia plures sunt ibi disseysinæ. Et vice versa, si unus vel plures cohæredes disseysīnā fecerint cohæredib⁹ uni vel pluribus sive extraneis, quilibet de facto

struck root. There are some however who say that the removal of the tree and the stone is rather a trespass than a disseysine, but this is not true, although a disseysine comprises a trespass, but not the converse. A thing also may be common amongst several persons, as amongst coheirs and parceners in common tenements, where the inheritance has not been partitioned. Likewise between neighbours in a certain tenement, which has been at some time in litigation and by common consent has been relinquished to one only or to several, if any one of such parceners shall have disseysed one of his co-parceners the same shall have an assise against his co-parceners for the tenement in common. And if he has disseysed two, each shall have his own assise by himself, because the disseysines are diverse, and the same thing shall take place with respect to several persons in a cause of acquiring possession before the partition of an inheritance, when it has been once acquired, and there are there different rights, although about an uncertain thing. But in acquiring the seysine of any ancestor in a cause of property, where there are different persons and different heads, but nevertheless as it were one heir in virtue of the right which devolves to them, no one can claim without the other the seysine of the ancestor near or remote, since they are all as it were one heir in virtue of a single right. But when once the inheritance has been entered upon and acquired, or has been divided amongst the heads or not, none without the other shall answer in a cause of property concerning the seysine of the ancestor, nor even in a cause of property in an assise of the death of the ancestor, as below. But concerning his own seysine, if there has been ejected one or more co-parceners by a co-parcener or co-parceners, or even by outside persons, each f. 167 b.
shall have a remedy by an assise by himself without his co-parcener, because there are several disseysines. And conversely, if one or more co-heirs have made a disseysine against one or more co-heirs or strangers, each shall

suo & de injuria sua ꝑ se respondebit: quia pœna suos tenere debet autores. Ante verò additionē hæreditatis conjunctū est jus & seysina antecessoris, & ita conjunctim ab omnib⁹ peti debet, qui conjuncti sunt quasi un⁹ hæres. Cùm autē adita fuerit, incipit vel adhuc manet esse jus unum conjunctum, & seysina diversa, sed communis quousq; fuerit partita, & ideò nullus sine alio respōdebit alicui, qui seysinam petet vel jus alicujus antecessoris sui, nec in causa proprietatis, nec in causa possessionis ꝑ assisam mortis antecessoris, cū ōnia sunt eis cōmunia, ꝓprietas s. & possessio. Si autem extrane⁹ petat de seysina sua ꝓpria in causa disseysinæ & spoliationis, si omnes disseysinam fecerint, omnes tenentur & cadunt in assisam. Si autem quidam illoꝝ & non omnes, illi tenentur qui fecerint, & non alii. Et idem erit si un⁹ tantū, & ipse solus incidit in assisam & in pœnam, & non alii. Sed esto q̄ disseysitus versus talem semel recuperaverit ꝑ assisam sive tenementum sive pasturam, & alius particeps à primo disseysitore illum ipsum ejiciat de eadē re, & ipse disseysitus iterū sup illū assisam portet, quæro an debeat ꝓcedere? videtur q̄ sic prima facie, quia licèt eadē sit res, diversæ tamen sunt ꝓsonæ, sed revera non est capienda, quia sic esset capere assisam sup assisam, & hac ratione, quia bene possit contingere q̄ ultima assisa posset esse contraria primæ, & ꝑ ultimam assisam possit adnihilari q̄ ritè actum esset ꝑ primā, & ita possunt esse judicia in pendenti, & esse in incerto, q̄ esse non debet. Et ita potest unus particeps & debet de seysina sua & injuria propria sine partici-

answer by himself for his own act and his own injustice, because punishment ought to reach its authors. But before the entrance upon the inheritance the right and seysine of the ancestor are conjoint, and so must be claimed conjointly by all, who are conjoint as if they were one heir. But when it has been entered upon, there begins or still remains one conjoint right, and a different seysine, but common until a partition has been made, and therefore no one without the other shall answer to any one, who shall claim seysine, or the right of any ancestor of his own, nor in a cause of property, nor in a cause of possession by an assise of the death of an ancestor, since all things are common to them, the property, for instance, and the possession. But if a stranger claims concerning his own seysine in a cause of disseysine or spoliation, if all have made the disseysine, all are liable and fall into the assise. But if certain of them and not all, they are liable who have done it, and not others. And it will be the same, if one only, and he alone falls into the assise and into the penalty, and not the others. But let it be, that a party disseysed has once recovered against so-and-so by an assise, either a tenement or a pasture, and another co-parcener with the first disseysor ejects him from the same property, and the party disseysed again brings an assise against him, I ask whether he ought to proceed? It seems in the affirmative at first sight, because although it be the same thing, the persons howsoever are different; but in truth [an assise] is not to be taken, for so it would be to take an assise upon an assise, and for this reason, that because it might well happen that the last assise might be contrary to the first, and by the second assise what had been duly done by the first assise should be nullified, and so judgments might be pendent and be in uncertainty, which ought not to be the case. And so one co-parcener may and ought to answer concerning his seysine and proper injury without

pibus suis respõdere, & non habebitur in hoc casu regressus ad aliud, nisi ad convincendos juratores, si particeps qui p assisam amisit, hoc voluerit.

Cap. IX.

1. De eo, qui est in possessione nomine alieno, et cui non competit assisa.

Britton, l. ii. ch. xii. § 1.

Fleta, 219.

Dictū est in ꝑximo capitulo ꝑcedēti, cui cōpetat remediū p assisam, sive teneat rem ꝑpriam vel in cōmuni, post divisionē verò hereditatis cōmunis plures erunt seysinæ & plura jura separata, sed tamen nō debet quis sine alio respondere, nisi velit in causa ꝑprietatis, q si faceret, nullū haberet regressum erga participes suos si fortè amitteret, & q dictū est de cohæredibus participibus, dici poterit de vicinis. Nunc autem dicendum est, cui non competat remedium p assisam, nec querela. Nulli autem competit querela nec remedium per assisam, qui in possessione fuerit nomine alieno, quia talis non possidet, licèt in possessione fuerit, sed ipse possidet cujus nomine possidetur. Et longè aliud est possidere, quàm esse in possessione. In possessione autem sunt, licèt non possident, custos qui tenet aliquando in dominico licèt non in feodo. Item procurator. Item familia, servus proprius, vel alienus bona fide possessus. Item firmarius vel fructuarius, quod non dicitur de feodi firmario. Item usu-

f. 168. rarius & hospes. Item qui ad voluntatē tenuerit de die in diē, de anno in annū, licèt warrantū vocare possit, secundū quosdā, sicut & usufructuari[9] qui tenet ad termꝰ annoꝝ, tales querelā non habebunt nec remediū p assisam, quia non habēt actionē, sed dñs proprietatis: & ideò si agant, locum habet conꝰ eos exceptio ꝑprietatis, & liberi tenemēti à quocunq, disseysitore

his co-parceners, and recourse shall not be had in this case to another, except to convict the jurors, if the co-parcener who has lost by the assise should wish it.

Chapter IX.

It has been said in the next preceding chapter, who is entitled to a remedy by an assise, whether he holds a thing as his own property or in common, but after the division of a common inheritance there will be several seysines and several separate rights, but nevertheless no one ought to answer without another, except he wishes so in a cause of property, which if he should do, he would have no recourse against his co-parceners, if by chance he should lose, and what has been said of coheirs co-parceners, may be said of neighbours. But now we must say who is not entitled to a remedy or a plaint by an assise. No one then is entitled to a plaint or a remedy by an assise, who is in possession in another's name, because such a person does not possess, although he may be in possession, but he in whose name it is possessed, is the possessor. And it is a far different thing to possess from being simply in possession. For persons are in possession, who do not possess, for instance a guardian, who holds a thing in domain, although not in fee. Likewise an agent. Likewise a household, one's own serf, or another's serf possessed in good faith. Likewise a holder for a term or a lessee of the crops, which is not said of a lessee of the fee. Likewise an usurer and a guest. Likewise a tenant at will from day to day or from year to year, although he may be able to call a warrantor, according to some, like an usufructuary, who holds for a term of years, such persons shall not have a plaint or a remedy by an assise, because they have not a right of action, but the lord of the property has; and if they proceed, an exception may be taken against them concerning the property and the freehold on the part of any disseysor,

1. Of him, who is in possession in another's name, and who is not entitled to an assise.

f. 168.

apposita, sive jus habuerit ejiciendi sive non, & si nō cōpetat eis de jure exceptio, tamen dissimulanda erit ꝑpter verū dñm cui cōpetit actio. Itē non cōpetit eis querela nec remediū ꝑ assisam, qui statim & incontinenti post disseysinā à vero dño sunt ejecti flagrante maleficio. Itē non cōpetit intrusori eodem modo, nisi tēp⁹ habuerit longum & pacificum, q̄ sufficere possit ꝑ titulo. Item nec ei, qui nunquā fuit in seysina nec quasi in seysina, & idē si min⁹ sufficientē habuerit seysinā sicut injuriosam ſine tempore & pace contentiosam. Itē non competit villano nec villanæ sub potestate dominoꝝ existentib⁹ de puro villenagio conꝫ dñm suum nec contra alios quoscunq; tā ratione ꝑsonarū q̄ tenementi, sive sit de antiquo villenagio sive de novo. Si autē ꝑquisitum fuerit, contra dñm nō cōpetit assisa in cujus potestate fuerit, cōpetit tamē conꝫ feoffatores extraneas ꝑsonas, quousq; dñs (sub cuj⁹ potestate fuerit) tenementū illud in manum suam ceperit, ut infrà de exceptionib⁹ pleni⁹ dicetur. Itē non cōpetit ei qui tenuerit de villano socagio in dominicis dñi regis, nec puris villanis, competit tamē quandoq; eis qui adventitii sunt, & habent cōventionē suam ꝑ certa servitia quāvis villana, ad similitudinē eoꝝ, qui tenēt de dominico dñi regis in villano socagio, nisi hoc fuerit in libero burgo sive infra manerium tale. Itē non competit ei qui de nave sua eject⁹ fuerit, quasi de libero teñto suo, non magis q̄ si tract⁹ esset de equo suo sive de vehiculo, curru, carecta vel carro. Sed quid dicetur de eo qui eject⁹ erit de ædibus ligneis ? cōpetit ei assisa, si cōsistāt in solo ꝑprio, sive solo cohæreant sive non, si autē cōstruātur in solo alieno,

whether he has had the right of ejectment or not, and if they are not entitled to an exception of right, nevertheless it will have to be dissembled on account of the true lord, who is entitled to an action. Likewise those persons are not entitled to a plaint or a remedy by an assise, who immediately and forthwith after a disseysine have been ejected by the true lord, whilst the misdoing was flagrant. Likewise an intruder is in the same way not entitled, unless he has had a long and peaceable holding, which may suffice for a title. Likewise not he who never was in seysine or as it were in seysine, and the same if he has had an insufficient seysine of an unjust character and contentious without time or peace. Likewise a villein man or woman, being under the power of their lord in pure villenage, cannot have an assise against their lord nor against any others as well by reason of their persons as of the tenement, whether it be of ancient or modern villenage. But if the tenement has been acquired, the villein is not entitled to an assise against the lord in whose power he may be, but he is entitled against strange feoffors, until the lord, under whose power he may be, has taken that tenement into his hand, as will be explained in treating of exceptions. Likewise he is not entitled, who has held of villein sockage in the demesnes of the lord the king, nor are pure villeins entitled, but sometimes those are entitled, who are adventitious, and have their convention for certain services although of a villein character after the likeness of those, who hold of the demesne of the lord the king in villein sockage, unless it be in a free borough or within such a manor. Likewise he is not entitled who has been ejected from his ship, as if from his free tenement, no more that if he had been dragged off his horse or out of his vehicle, chariot, car, or cart. But what shall be said of him who has been ejected from a wooden house? He is entitled to an assise if it stands on his own ground, whether it is attached to the ground or not, but

aut p̃cessit ꝑhibitio ne amoveanť, vel denuntiatio ne fierēt, in quib⁹ casibus cōpetit ei assisa in cujus solo ædificatum est, & non ei qui ædificavit, quia post denuntiationē sive ꝑhibitionē, effectæ sunt contentiosæ, & non est licita amotio. Si autē nulla p̃cessit denuntiatio nec ꝑhibitio, & sic quasi sine cōtentione licitè amotæ fuerint, non cōpetit dño soli aliquod remedium ꝑ assisam. Itē non cōpetit alicui assisa nisi ei qui possidet, nec à possessione potest aliquis dejici, nisi ille qui possidet nomine ꝑprio, possidet dico, ꝑ se vel ꝑ alium naturaliter vel civiliter, vel altero istorū. Itē nō cōpetit ei si eject⁹ fuerit sine judicio, qui tenuerit ꝑ legē Angliæ ratione liberorū suorū, qui postmodū cōvicti sunt ad bastardos, & quamvis velit tales in curia Christianitatis ꝑbare ad legittimos nō audireť, sed si de facto hoc facere vellet, vero hæredi cōpeteret ꝑhibitio. Itē non cōpetit donatorio, qui nullam omnino seysinam habuit ꝑ se quamvis cum donatore, quia, si talis ejectus fuerit à vero hærede, dū tamen incontinenti post mortē donatoris antequā tempus habuerit tale, q̃ sine judicio ejici non possit, si autem ab extraneo ejiciatur, & cujus non interfuerit, omni tēpore recuperabit, ꝑpter modum possessoris, post tempus verò recuperare poterit verus hæres ꝑ assisam mortis antecessoris. Itē idē erit si cōvicti fuerint, q̃ hæredes esse nō possint nec ꝑpinqui nec remoti, ut si terra data fuerit certis hæredib⁹ aliis omnino exclusis, ut si terra data fuerit in maritagium cum aliqua muliere viro & hæredibus de ipsis duobus vel de eorum carne exeuntib⁹. Item non competit viro sine uxore de hæreditate uxoris, cùm ambo fuerint simul dissey-

Britton, l. ii. ch. xii. § 3.

Fleta, 220.

f. 168 b.

if it be built on another person's ground, or a prohibition against its removal has preceded, or an order not to remove it, in which cases he is entitled to an assise, on whose ground it has been built, and not he who has built it, because after the order or the prohibition it has become a subject of contention, and its removal is not allowable. But if no order or prohibition has preceded, and so it has been removed allowably without any contention, the lord of the ground has not any remedy by an assise. Likewise no person is entitled to an assise except he who possesses, nor can any one be ejected from possession except he who possesses in his own name, I say possesses by himself or by another, naturally or civilly, or in one of those ways. Likewise he is not entitled to an assise, as if he has been ejected without a judgment, who has held by the law of England by reason of his children, who have been afterwards proved to be bastards, and although he may be willing to prove such children in the court of Christianity to be legitimate, he shall not be heard, but if he wishes to do so in fact, the true heir will be entitled to a prohibition. Likewise a donatory is not entitled to it, who has no seysine at all by himself, although with the donor, because if such a person should be ejected by the true heir, provided however [it be done] forthwith after the death of the donor before he has had such a time, that he cannot be ejected without a judgment, but if he be ejected by a stranger and who has no interest, he shall recover at all times on account of the mode of possession, but the true heir may recover after a time by an assise of the death of an ancestor. Likewise the same will result, if they be proved that they cannot be heirs neither near f. 168 b. nor remote, as if land has been given to certain heirs to the exclusion of others, as if land has been given for a maritage with a certain woman to a man and the heirs issuing from them both or of their flesh. Likewise a man is not entitled to an assise without his wife con-

siti, nec etiam uxori p se, quæ p se fuerit disseysita & quæ postmodum nupserit viro, licèt ante nuptias impetraverit, quia cadit breve illud. Itē nō competit aliquando ante tempus, ut si quis ab hostibus captus fuerit, dum fuit sub eorum potestate, cùm autem ad libertatem redierit de eorum manibus, aliud erit. Item competit uxori liberæ copulatæ villano & non è converso. Et competit eis de rebus uxoris priùs acquisitis, cùm uxor libera & villanus simul sint in possessione & seysina extra potestatem dominorum, ut si servus ingrediatur ad liberam uxorem habentem liberum tenementū vel dotem, si ejiciantur, recuperabunt non obstante servitute viri, sed non è contrario, libero copulato villanæ in villenagio, & dum ambo fuerint sub potestate dominorum. Uxori verò liberæ nunquā cōpetit actio de acquirendis, nisi post mortē villani, non magis quā in vita ejus, sed ꝑvidebitur ei ꝑ aliud breve, sicut liberæ à servo liberatæ. Libero autē homini nunquā competet de villenagio uxoris, de libero autem tenemento suo ꝑprio benè cōpetit, non obstante uxoris villenagio. Item non competit ei, qui ex libera uxore & villano conjugatis & sub potestate dominorū cōstitutis de hæreditate matris liberæ, si fortè post mortem matris fuerit in seysina, vz. cōtra dominū suum sub cujus fuerit potestate, sed contra alios quoscunq; præterquā contra dominum capitalem hæreditatis illius, si alii non sint hæredes, & si statim ejiciatur: si autem alii sint hæredes, vel si post tempus pacificum ejiciatur, recuperabit, & consulitur hæredibus vel dño ꝑ aliud breve. Itē non cōpetit alicui

Britton, l. ii. ch. xii. § 19.

cerning the inheritance of his wife when both have been disseysed together, nor even to the wife by herself, who has been disseysed by herself, and has afterwards been married to a man, although she may have obtained it before marriage, because that writ fails. Likewise a person is sometimes not entitled to it before a certain time, as if a person has been made captive by the enemy, whilst he has remained under their power, but when he has been restored to liberty out of their hands, it will be otherwise. Likewise a free woman coupled to a villein is entitled, but not the converse. And they are entitled in respect of the things of the wife previously acquired, when a free wife and a villein husband are together in possession and seysine beyond the power of the lord, as if a serf should have access to a free wife having a free tenement and dower, if they be ejected, they shall recover notwithstanding the serfage of the man, but not the contrary in the case of a free man coupled to a villein woman in villenage, and whilst both are under the power of the lord. But a free wife is never entitled to an action for property to be acquired, unless after the death of the villein [husband], nor more than during his life, but provision shall be made for her by another writ, as for a free woman liberated from a serf. But a free man is never entitled to an assise concerning villein property of his wife, but he is for his own free tenement, notwithstanding the villenage of his wife. He is not entitled, who is born of a free wife and a villein coupled and established under the power of a lord, concerning the inheritance of his free mother, if by chance he has been in the seysine of it after the death of his mother, to wit, against his lord in whose power he may be, but against all others whomsoever except against the chief lord of that inheritance, if there be no other heirs, and if he be ejected forthwith. But if there be other heirs, or if he be ejected after a peaceable time, he shall recover, and aid is given to the heirs or the lord by another writ.

viro religioso (secundū quosdā), qui feoffat[9] fuerit p aliquem qui de dño rege tenuerit in capite vel de alio, nisi residuum q remanserit in manibus feoffatorū sufficiat ad plenum servitium, ppter constitutionem libertatis.[1] Item nulli cōpetit assisa qui p dominū regē vel ballivos suos nōine suo fuerit disseysit[9], nisi manifesta fuerit disseysina, & quo casu erit voluntas domini regis expectanda. Si autem non fuerit manifesta, quia fortè contentio est de finib[9] agroř, adhuc erit expectanda volūtas dñi regis ut de præcepto suo, & si ei placuerit, fiat inde perambulatio, & sic terminetur negotium. Item non competit ei, qui in villenagio tenuit & p villanas consuetudines, licèt persona libera sit, sive tenementum sit purum villenagium sive privilegiatum, ut dominicum domini regis, quia tales nihil tenent nomine proprio sed nomine alieno, cùm omnes consuetudines & servitia in puro villenagio omnino sint incerta. Si autem certa sunt, sicut in villenagio privilegiato vel villenagio puro, si ejiciatur tenens, non competit ei remedium per assisam novæ disseysinæ, quia tenet ut villenagium & nomine alieno. Sed tamen bene possit sustineri in hoc casu, quòd assisa verteretur in juratam, saltem ad inquirendum de conventione vel de privilegio, ut querens saltem habeat suam conventionem vel privilegium. Item non competit ei assisa, ut si quis se intruserit in aliquod tenementum conť conventionē & chirographum vel finem factum, nisi hoc fecerit p conventionem duplicatā: ut si ita convenerit in donatione q, nisi hoc factum fuerit vel non fuerit, bene liceat tali se ponere in seysinam, non obstante fine facto, vel conventione, vel homagio vel hujusmodi. Videndū erit utrum satis-

Britton, l. ii. ch. xii. § 1.

f. 169.

[1] "constitutionem libertatis." The second Charter of Liberty of Henry III. ch. 43 (A.D. 1217) is probably here referred to.

Likewise a person under religious vows (according to some) is not entitled, who has been enfeoffed by some one, who held in chief from the king or from another, unless the residue which has remained in the hands of the feoffors is adequate to the full service, on account of the Statute of Liberty. Likewise no person is entitled who has been disseysed by the lord the king or his bailiffs in his name, unless the disseysine be manifest, and in which case the will of the lord the king is to be expected. But if it be not manifest because it is by chance a contention respecting the boundaries of fields, the pleasure of the king has to be attended, that under his precept, and if it so pleases him, there may be a perambulation, and so the business be terminated. Likewise he is not entitled to it, who has held in villenage and by villein customs, although he be a free person, whether his tenement be a pure villenage or privileged, as the demesne of the lord the king, because such persons hold nothing in their own name, but in another's name, since all customs and services in pure villenage are uncertain. But if they are certain, as in a privileged villenage or a pure villenage, if the holder be ejected, he is not entitled to a remedy by an assise of novel disseysine, because he holds it as a villenage and in another's name. But it may be contended in this case, that the assise is converted into a jury, at least to inquire concerning the convention or the privilege, that the complainant may have his convention or privilege. Likewise he is not entitled to an assise, as if a person has intruded himself into a certain tenement against a convention and f. 169.
a chirograph or a fine made, unless he has made it by a convention in duplicate: as if it has been so agreed in the donation, that unless this be done or be not done it may well be allowable for such an one to put himself into seysine, notwithstanding a fine has been made, or a convention, or homage, or such like. It will have to be seen whether the convention or the fine has been

factum fuerit conventioni vel fini sufficienter & modo debito, & ita q ille, qui se in seysinam posuit, contentus esse debeat de satisfactione. Item non competit ei assisa, qui tenet per legem Angliæ vel nomine dotis, vel alio quocunq, modo ad vitam, & ita q habeat liberum tenementum, si vastum fecerit vel destructionem, si dominus capitalis, vel amicus cujus interfuerit, tenementum suum in manum suam ceperit simplici tamē captione, propter vastum & destructionem, dum tamen parat[9] fuerit restituere, facta inde plenè satisfactione de vasto facto, & accepta securitate de vasto ulteri[9] non faciendo. Quod etiam observari potest, si aliquis hoc fecerit cujus interfuerit parens vel amicus, qui fortè custodiam habuerit. Et de hac materia inveniatur in itinere M. de Pateshul ad assisam novæ diss. capiend & gaolas deliberādas in coñ North., assisa novæ disseysinæ si Rogerus de Deneford, & sic intentio dejicientis vel impedientis quandoq, excusat à disseysina. Talibus enim personis conceditur rationabile estoveriū, & non vastū, & si in eo q modum excedat & mensuram impediantur, non erit per hoc eis injuriatum. Item non competit assisa uxori per se sine viro, nec cum viro si vir donationē fecerit de hæreditate uxoris vivente uxore, quia ipsa p se sine viro assisam portare nō poterit in vita viri nec post mortem, & unde si ambo nominētur cadit assisa, quia vir injustè non est disseysitus, nec ipsa sine viro queri potest, ne ambo fecerint[1] disseysinam. Item nō competit dño contra tenentem suum de servitio ei detento, quia locū ibi habet districtio, dum tamen districtio non vertatur ad disseysinā, q multis modis fieri pote-

[1] "nec ambo fecerunt." MS. Rawl. C. 160.

sufficiently and duly satisfied, and so that he, who has put himself into seysine, ought to be content with the satisfaction. Likewise he is not entitled to an assise who holds by the law of England, or in the name of dower, or in any other manner for life, and so that he has a free tenement, if he has caused waste or destruction, if the chief lord or a friend who is interested has taken the tenement into his own hand, by a simple taking however, on account of the waste and destruction, provided however he has been prepared to restore it by making thereupon a full satisfaction for the waste caused, and security having been accepted not to make further waste. Which also may be observed, if any one has done this, the relative or the friend of him who is interested, who by chance has had the custody. And in this subject there may be found in the iter of Martin de Pateshull on an assise of novel disseysine and for gaol deliveries in the county of Northampton an assise of novel disseysine, if Roger de Deneford, and so the intention of the party ejecting or impeding sometimes excuses from a disseysine. For to such persons reasonable firewood and not waste is granted, and if they are impeded in respect of it exceeding moderation and measure, no injury will have been caused to them. Likewise a wife is not entitled to an assise without her husband, nor with her husband, if the husband has made a donation of his wife's inheritance during the wife's lifetime, because she by herself without her husband will not be able to bring an assise in the lifetime of her husband, or after his death, and hence if both are named the assise fails, because the husband has not been unjustly disseysed, nor can she without her husband complain, nor have both made a disseysine. Likewise a lord is not entitled against his tenant concerning a service withheld from him, because a distraint is applicable in such a case, provided however that the distraint is not converted into a disseysine, which may take place in many ways, unless it should

rit, nisi fuerit rationabile, ut alibi contra alium bene competit, ut infrà dicetur. Si autem tenens ad assisam respondeat ita, q assisa nō jacet inter ipsum & dñm suum, per hoc cognoscit q de eo tenet & sic cadit assisa, & per hoc q assisa cadit in eodem judicio, statim p hoc surgit districtio, unde statim præcipiant justitiariis vic. quod sit in auxilium dño ad distringendum, si dominus non sufficiat. Si autem tenens dominum suum deadvocaverit, statim facit eum non tenentem quantum ad se ipsum, licèt re vera tenens sit, & sic statim locum habet disseysina multis rationibus, ut si extraneus distringat tenentē ad solvendū ei, statim jacet assisa inter dñm & extraneum, si autem tenens gratis solverit extraneo, tunc jacebit assisa in persona utriusq. Item potest quis esse tenens meus reddendo mihi redditum, & possum redditum illum dare alicui & attornare tenentem meum ad reddendum redditum illum meo feoffato p manum suam, sicut mihi reddere consuevit per manum suam, & sic non erit tenens meus homo illius, cui p me attornatus fuerit, nec ille cui attornatus est erit dominus suus, & sic jacere poterit assisa novæ disseysinæ inter tales si fortè redditum & servitium non solverit. Item non competit ei, qui semel se retraxerit coram justitiariis tam à brevi quàm assisa propter aliquem defectum brevis vel psonæ querentis, vel ppter errorē ut infrà pleni[9] dicetur. Itē non cōpetit ei, qui semel se cognoverit ad villanum corā just. & de hoc convictus fuerit, nisi fortè imposterū mutato statu q privilegium habeat vel exceptionē, ut infrà. Item non competit ei, qui semel de bona voluntate sua dederit vel resti-

Britton, l. ii. ch. xi. § 18.

f. 169 b.

be reasonable, as elsewhere it may be available against another, as will be explained below. But if the tenant should answer at the assise, that no assise lies between him and his lord, he thereby recognises that he holds of him, and so the assise fails, and by reason that the assise fails in the same judgment, immediately thereupon arises a distraint, whereupon forthwith the justices should issue a precept to the viscount, that he shall be ready to assist the lord in the distraint, if the lord is not sufficient. But if the tenant has disavowed his lord, he forthwith makes him not a tenant as regards himself, although he is in matter of fact a tenant, and a disseysine immediately takes place for many reasons, as if a stranger distrains a tenant to make him a payment, immediately an assise lies between the lord and the stranger, but if the tenant has gratuitously paid to the stranger, then an assise will lie in the person of each. Likewise a person may be my tenant paying me a rent, and I may give that rent to some one and attourn my tenant to pay that rent to my feoffee by his own hand, as he has been accustomed to pay the rent to me by his own hand, and so my tenant will not be the man of him to whom he has been attourned by me, nor will the person to whom he has been attourned be his lord, and so an assise of novel disseysine may lie between such parties, if by chance he has not paid the rent and the service. Likewise he is not entitled, who has once withdrawn himself as well from a writ as from an assise on account of some defect of the writ or of the person complaining, or on account of an error, as f. 169 b. will be explained more fully below. Likewise he is not entitled who has once acknowledged himself to be a villein before the justices, and has been convicted thereof, unless by chance thereafter, his status having been changed, he may have a privilege and an exception, as below. Likewise he is not entitled who once of his good will has given or restored to some one a tenement

tuerit alicui teñtum aliquod in jure vel extra jus, dū tamen hoc ꝑbari possit, quia volenti non fit injuria. Itē si quis tenens, cùm ꝑsens non sit, velit rē repetenti restituere, sive in causa spoliationis sive ꝓprietatis, sufficit si chartā suā in signū traditionis & restitutionis in judicio tradiderit, talis enim traditio instrumenti vel signi sufficit ꝑ traditione rei, quoad restitutionē sine alia solennitate, licèt hoc non sufficiat quantū ad donationē, cum corporalis apprehensio non intervenerit, & unde etiā cum talis sic in judicio restituerit, si posteà se ꝑ vim tenuerit in seysina & ejectus fuerit, non recuperabit, quia semel ex volūtate restituit ꝑdicto modo: in tali enim casu restitutionis non est talis solennitas adhibenda, qualis in donationib⁹ observatur. Itē non jacet aliquando ratione donationis, ut si quis tantū dederit de teñto suo in liberā eleemosynā, ꝑ q capitalis dñs amiserit servitiū suū, quia hoc est conf constitutionē,[1] ut in rotulo de placitis quæ sequuntur regē anno regni regis H. vicesimo tertio apud Cateshul corā W. de Ralegh de Roberto de Toteshall & Priore de Bricksete de teñto in Bathford, ibi cecidit assisa. Itē de eodē q non cōpetit assisa, ut si quis tenuerit de dño rege in capite per servitiū militare, & ille talis aliquē religiosum feoffaverit in liberā eleemosynam: vel de aliquo alio q de dño rege ꝑ min⁹ servitiū. Et unde si dñs rex vel alius capitalis dñs talē religiosum ejecerit incontinenti, nō recuperabit, sicut in ꝑdicto casu corā eodem, nisi tempus habuerit post seysinā. Itē non cōpetit restitutio ꝑ assisam ꝓpter falsam causam possidendi, ut si mulier fuerit dìsseysita de teñto quod tenuerit nomine dotis, de qua sufficienter proba-

Britton, l. ii. ch. xii. § 5.

[1] "constitutionem." Probably the second re-issue of Magna Charter by Henry III., A.D. 1217, see above, p. 70.

with right or without right, provided however this can be proved, because a willing party cannot suffer an injury. Likewise if any tenant, when he is not present, wishes to restore to another, who claims restitution, whether in a cause of spoliation or of property, it is sufficient if he has delivered up judicially his charter as a sign of delivery and restitution, for such a delivery of an instrument or sign suffices for the delivery of the thing, as regards restitution, without any other solemnity, although this may not suffice as regards donation, since a corporeal handling has not intervened, and hence also, when such a person has so made restitution judicially, if he has afterwards kept himself by force in seysine and has been ejected, he shall not recover, because he has once made restitution in the manner aforesaid; for in such a case of restitution the same solemnity is not to be applied, as is observed in donations. Likewise it sometimes does not lie by reason of a donation, as if a person has given so much of his tenement in free alms, whereby the chief lord has lost his service, for this is against the Statute, as in the Roll of the Pleas which follow the king in the twenty-third year of the reign of king Henry at Cateshull before William de Ralegh, concerning Robert de Toteshall and the Prior of Bricksete, concerning a tenement at Bathford, where the assise failed. Likewise that an assise does not lie in the same matter, as if a person has held of the lord the king in chief by military service, and such person has enfeoffed a person under religious vows in a free tenement, or [has held] of some one else than the lord the king by a minor service. And hence if the lord the king or another chief lord has ejected forthwith such a religious person, the latter shall not recover as in the preceding case before the same [justice], unless he has had time after the seysine. Likewise a restitution by an assise does not apply upon a false cause of possession, as if a woman has been disseysed of a tenement, which she has held in the name of dower, concerning

tum est in foro ecclesiastico, q nunquam fuit ei, cujus nomine dotē habuit, legittimo matrimonio copulata, quia si de facto, non tamen de jure, & ideò nulla dos: quia ubi nullum matrimonium, ibi nulla dos, & sic desinit esse liberum teñtum ꝑpter falsam causam possidendi, & ideò licèt ab initio crederetur ibi esse matrimoniū, tamē ibi nullū fuit, & ideò dos nulla. Et quāvis talis mulier sine judicio ejiciatur, tamē ꝑ assisam nō recuperabit ꝑpter falsam causam possidendi, & sic non desinit esse liberum teñtum q nūquā fuit libeř teñtum revera, & non potest desinere esse q nūquā incepit. Idē poterit esse, si vir alicujus mulieris primò aliā duxit in uxorē de jure, & aliā posteà de facto, hoc detecto, cùm prima ꝑbaverit secundū matrimoniū adulterium, deficit omnino, & quia tunc primò causam possidendi nō habet ꝑ verā ꝑbationē intervenientē, si sine judicio ejiciatur, ꝑ assisam non recuperabit, ꝑpter falsam causam possidendi: & ita erit qualitercunq; ꝑbatū fuerit q matrimoñ secūdū stare nō possit, & quia seysina q talis mulier supinducta pri⁹ habuit nulla fuit in se sed ōnino vitiosa, nisi sit qui dicat q ab initio ignorātia eos excusat, sed non est ibi nisi p̃sumptio, q postmodum vincit ꝑbatio vera. Item non cōpetit ei restitutio ꝑ assisam, si vir incontinenti ejiciatur post mortem uxoris de re uxoria qualicunque,
f. 170. cùm liberos simul nunquā habuerint, post intervallū verò ejici sine judicio nō potest: vel si habuerint & cōvicti sunt ad bastardos, vel alio modo q hæredes

which sufficient proof has been made in the ecclesiastical court, that she was never coupled in lawful matrimony to him, in whose name she holds the dower, because if she holds it in fact, she does not hold it of right, and therefore there is no dower, because where there is no matrimony, there is no dower, and so it ceases to be a free tenement on account of a false cause of possession, and therefore although from the commencement it was believed that there was matrimony there, nevertheless there was none, and therefore no dower. And although such a woman be ejected without a judgment, nevertheless she shall not recover by an assise on account of a false cause of possession, and so it does not cease to be a free tenement, which never was a free tenement in truth, for a thing cannot cease to be which has never begun. The same thing may happen, if the husband of any woman has married in the first place one woman as his wife of right, and another afterwards as his wife in fact, upon his having been detected, when the first wife has proved the second an adulterous marriage, it fails altogether, and because then for the first time she has no cause of possession through the true proof intervening, if she be ejected without a judgment, she shall not recover by an assise on account of the false cause of possession, and so it shall be in whatever way it be proved that the second marriage cannot stand, and because the seysine which such a woman in super-addition to the first had was null in itself and altogether vicious; unless there be some one who says, that from the commencement ignorance excuses them, but there is there nothing but a presumption, which the true proof afterwards overpowers. Likewise he is not entitled to restitution by an assise, if the husband be forthwith ejected after the death of his wife from any property, which belonged to his wife, when they have never had children, f. 170.
but after an interval he cannot be ejected without a judgment; or if they have had children and they have been proved to be bastards, or in any other way so that

esse non possunt, ut suprà eodem. Itē nō cōpetit restitutio p assisam ꝑpter falsam impetrationē, s. ubi quis impetraverit antequā subesset causa impetrationis, q de facili ꝑpendi poterit p datā brevis. Eodem modo si causa fuit impetrandi & posteà desinit esse, ut si disseysitor rem disseysitā dño ꝑprietatis restituerit illam gratis accipienti oblatā, desinit esse restitutio p assisam. Aliud autem est, si ver^{9} dñs seysinā suā sibi usurpaverit virib^{9} & non judicio. Item desinit esse causa & non cōpetit ei restitutio p assisam, si disseysit^{9} rē spoliatam (dissimulando injuriā) gratis remiserit, & quietā clamaverit, vel condonaverit, vel si disseysitus donū q inde fecerit (ratum habendo) cōfirmaverit, cùm seysinam suam rehabere posset, si vellet. Itē non cōpetit assisa cùm desinat esse causa quæ primò fuit, & cadit omnino ꝑpter ordinem placitandi non observatū: ut si quis disseysitorem suum primò implacitaverit de teñto p brē & in suo casu de teñto, unde assisa aramata est super jure & ꝑprietate p breve de recto, vel de ingressu qualitercunq; plus vel minus, vel p assisam mortis antecessoris. Itē non cōpetit restitutio p assisam ratione loci, sed cadit omnino sicut in dominicis domini regis, s. in villenagiis privilegiatis, ubi nec assisa novæ disseysinæ, nec assisa mortis antecessoris nec aliud breve, nisi tantū parvum breve de recto secund consuetudinem maneriorum currit. Possunt tamen aliquando in maneriis dñorum esse liberè tenentes & tenere p servitium militare p homagio & servitio, & in liberum sokagium & serjantiam, & p

they cannot be heirs, as above, in the same manner. Likewise he is not entitled to restitution by an assise on account of a false request, as where a person has obtained a writ before the cause for the request arose, which may be easily ascertained by the date of the writ. In the same way if there has been a cause for obtaining a writ, and it has afterwards ceased, as if the disseysor has restored the disseysed property to the lord of the property, who has received it thankfully when offered, the restitution by an assise ceases. It is, however, different if the true lord has usurped his seysine by force, and not by a judgment. Likewise there ceases to be a cause for him, and he is not entitled to restitution by an assise, if the party disseysed has remitted gratuitously the spoliation of the property by dissembling the injury, and has quit-claimed and condoned, or if the party disseysed has confirmed the gift which he has made thereof (by ratifying it), when he might have back again the seysine, if he wished. Likewise he is not entitled to an assise, when the cause which first existed has ceased, and it fails altogether on account of the order of pleading not being observed, as, for instance, if a person has first impleaded his disseysor concerning a tenement by a writ, and in his own case concerning a tenement respecting which an assise has been instituted regarding the right and the property by a writ of right, or by an entry of any kind, more or less, or by an assise of the death of an ancestor. Likewise a restitution by an assise does not happen by reason of the place, but it fails altogether, as in the demesnes of the lord the king, for instance in privileged villenages, where neither an assise of novel disseysine, nor an assise of the death of an ancestor, nor any other writ runs, except a little writ of right according to the custom of the manors. There may be, however, sometimes in the manors of lords free tenants, and they may hold by military service for homage and service, and in free sockage and ser-

conventionem de gratia dñorum, licèt hoc esset ab initio villenagiū. Poterit enim quis de villenagio suo facere liberum tenementum & feodum militare, si voluerit. Itē non cōpetit restitutio ꝑ assisam ꝑpter teñtum, ut si liber homo tenuerit villenagiū per villanas consuetuđ & servitia incerta, faciendo inde quicquid ad villenagiū ꝑtinet. Itē non cōpetit ꝑpter personam, licèt sit liberum teñtum, ut si villano tradatur à dño suo (sine manumissione & libertate) aliquod liberū teñtum tenendum ꝑ liberum servitium ad volunt̃ dñi sine mentione hæredum, quia si mentio fieret de hæredibus, ꝑsumi posset ex hoc ꝙ dñs vellet eū esse liberum, ꝙ quidem sufficere posset ꝑ manumissione. Est enim ratio & regula generalis in istis duobus casibus, ꝙ liber homo nihil libertatis ꝑpter ꝑsonā suā liberā confert villenagio, nec liberum tenementum è contrario in aliquo mutat statū aut conditionē villani. Item non competit restitutio per assisam ei, qui tenet ad voluntatē alicujus de anno in annum, quia apponitur terminus certus & determinatus, quia ꝑ hoc innuit ꝙ voluntas cōcedentis est annualis, & sic nulla assisa ꝑpter tempus determinatum, ut de itinere W. de Ralegh in comitatu Bedf. assisa novæ disseysinæ, si Milo. Si autem sic concessum fuerit tenementum, donec quis providerit sive ad voluntatem sive non, dum tamen ita
f. 170 b. dicatur, donec ꝑviderit: semper remanebit res data accipienti ut liberum tenementum, donec provisum fuerit, & si nunquam ꝑvideatur, ita semper remanebit in feodo. Et illud idem dici poterit de terra data ad terminum annorum, ut si dicatur, concedo tibi tantā terram ad talem terminū, & ego warrantizabo &c., & si aliquid amiseris ꝑ defectu warrantiæ, volo ꝙ teneas terrā illā ultra t̃minum tuum, donec tibi reddidero

jeanty and by a convention through the favour of the lords, although this should be from the beginning villenage. For a person may make of his villenage a free tenement and a military fief, if he wishes. Likewise restitution by an assise is not applicable on account of the tenement, as if a free person has held a villenage by villein customs and uncertain services, by doing therefrom whatever appertains to a villenage. Likewise it does not apply on account of the person, although it be a free tenement, as if there be delivered by his lord to a villein (without manumission and liberty) a free tenement to be held by free service at the pleasure of the lord without mention of heirs, because if mention were made of heirs, it might be presumed from this that the lord meant him to be free, which would be sufficient for manumission. For there is a reason and general rule in those two cases, that a free man does not confer any freedom on account of his free person upon a villenage, nor does a free tenement on the contrary in any respect change the state and condition of a villein. Likewise restitution by an assise does not apply in the case of him, who holds at the pleasure of another from year to year, because a certain and definite term is appointed, because thereby it announces that the will of the grantor is for a year. and so no assise is allowed on account of the term being limited, as in the iter of William de Ralegh, in the county of Bedford, an assise, if Milo. But if the tenement has been so granted, until some one has provided either at will or not, provided however it be said, until he has provided, the thing given will always remain to the receiver as a free tenement, until it has been provided, and if it be never provided, it will always so remain in fee. And the same may be said of land given for a term of years, as if it be said, I grant you so much land for such a term, and I will warrant it &c., and if f. 170 b.
you should lose anything by defect of this warranty, I

quicquid amiseris ꝑ defectu warrantiæ, & sic poterit esse ꝙ nunquā reddet, & ita poterit terra remanere in feodo imperpetuum ut liberum teñtum suum. Si autem dicat, donec ipse vel hæredes sui ꝑviderint, & licet ipsè non ꝑvideat, sufficit si hæredes ꝑvideant. Item si dicat, donec ego & hæredes mei ꝑviderimus tali, nulla facta mentione de hæredibus, si ei in vita sua non ꝑvideatur, remanebit tenementum in feodo, licèt donator vel hæredes sui hæredibus donatorii velint providere. Provisio enim in hac parte restringitur ad ꝑsonas tam dantis ꝙ accipientis & hæredum ipsorum. Item non competit restitutio ꝑ assisam ratione rei de qua agitur, ut si quis queratur se esse disseysitum de aliqua re, quæ ritè & ꝑ pontifices Deo fuerit dedicata, sicut de ecclesiis & cœmeteriis, quia hujusmodi in nullius bonis esse poterunt, s. in bonis nullius singularis ꝑsonæ, sed solummodo in bonis Dei sunt, & si fortè de facto ab aliquo super hm̃i quereretur assisa, commutari poterit assisa in juratam ad inquirendum de transgressione, in quo casu si transgressum esset, uterꝙ foret in misericordia, querens s. ꝑ falso clamore, & transgressor ꝑ transgressione. De eo autem ꝙ non est sacrum, sicut de libera eleemosyna, non erit ita, dicitur enim libera eleemosyna, & magis libera ut infrà. Item eodem modo non competit restitutio ꝑ assisam alicui singulari ꝑsonæ de teñtis & locis quæ sunt quasi sacra, sicut ea quæ sunt cō-munia civitatum & universitatum, sicut stadium & theatrum & alia, sicut muri & portæ, viæ publicæ, & stratæ publicæ, quæ tantū deputatæ sunt ad aliquē

wish that you should hold that land beyond that term, until I shall have restored to you whatever you have lost from any defect of the warranty, and so it may be that he will never give it back, and so the land may remain in fee for ever as his free tenement. But if he should say, until he or his heirs have provided, and although he may not provide, it is sufficient if his heirs should provide. Likewise if he shall say, until I and my heirs have provided for so and so, no mention having been made of his heirs, if provision has not been made for him during his life, the tenements will remain in fee, although the donor or his heirs may wish to provide for the heirs of the donatary. For the provision in this case is restricted to the persons of the giver and of the receiver and their heirs. Likewise a restitution by an assise does not apply by reason of the thing which is the subject of an action, as for instance if a person should complain that he has been disseysed of a thing, which has been dedicated to God with due rites and by the pontiffs, as in the case of churches and cemeteries, for things of this kind cannot be a private person's property, but they are the property of God alone, and if by chance in fact an assise be asked for by any person respecting things of this kind, the assise may be converted into a jury to inquire respecting the trespass, in which case, if there has been a trespass, each will be amerciable, for instance, the claimant for a false claim, and the trespasser for the trespass. But concerning that which is not consecrated, as for instance, concerning free alms, it will not be so, for there are said to be free alms, and more free alms, as below. Likewise in the same manner restitution by an assise does not apply to any individual person concerning tenements and places which are as it were consecrated, as those things which are common to cities or corporations, as a race-course and a theatre, and other things, as the walls and gates, the public roads and streets, which are only destined for

usum publicū, & in quib⁹ nulla singularis ꝑsona ꝑ se aliquod jus vẽdicare poterit, in quibus transgressio est & non disseysina, quia nulla singularis ꝑsona inde poterit esse in seysina, & disseysiri nō potest aliquis de eo, q̄ nō potest possidere. Nec si quis dicat se aliquid inde possidere ꝑ juratā, in q̄ vertitur assisa ut suprà, in primo casu aliquid ꝑ juratā retinebit, nec querens aliquid recuperabit, nisi tantū usum cōmunem: ad quē hm̃i loca sunt deputata: ut de itinere M. de Pateshul in com̃ South. ad assisas novæ diss. capiendas & gaolas deliberandas, si Adam Gerū. Infrà plus de hac materia de transgressionibus.

Cap. X.

1. Contra quem competit assisa, et quibus modis quis incidat in assisam.

Dictū est suprà, cui cōpetat querela & remediū ꝑ assisam post disseysinā factā, & cui non: nunc autem dicend̄ contra quem cōpetat, & quibus modis quis incidat in assisam. Cōpetit enim assisa conſ liberum hominem masculū & fœminā, majorē & minorē, clericum & laicum, Christianum & Judæū, ita conſ furiosum, sicut conſ illum qui est sanæ mentis. Item cōtra servum sicut contra liberū, ne serv⁹ melioris sit conditionis q̄ liber, cùm deterioris esse debeat. Item tam contra ipsum qui autoritatem præbet dejicientibus præcepto, consilio, & auxilio inductivo, quàm contra ipsum qui disseysinam ratam habet ex post facto, vel quia injuriam non emendaverit, cùm fuerit interpellatus ab homine personaliter viva voce, vel saltem per diligentem impetrationem & diligentem prosecutionem, dum tamen præsens hoc sciverit, vel scire possit & debeat, & ita quòd ibi non sit crassa ignorantia, quod esse poterit, si omnes de patria sciverint disseysinam

f. 171.

some public use, and in which no individual person can claim any right for himself, in which there is trespass but not disseysine, because no single person can be in seysine of them, and no one can be disseysed of that, which he cannot possess. Nor if any one should say, that he possesses anything therein before the jury, into which an assise is converted as above said, in the first case he shall retain nothing by the jury, nor as complainant shall he recover anything, except only the common use to which places of this kind are destined, as in the iter of Martin de Pateshull in the county of Southampton for holding assises of novel disseysine and gaol deliveries, if Adam Gerum. Below more on this subject concerning trespasses.

Chapter X.

1. Against whom an assise may be brought, and in what modes a person is liable to an assise.

We have discussed above who is entitled to a complaint and remedy by an assise after a disseysine has been made, and who not: now we must consider against whom it may be made, and in what ways a person becomes liable to an assise. For an assise may be brought against a free person, male and female, major and minor, clerk and laic, Christian and Jew, against a madman equally as against him who is of sound mind. Likewise against a serf just as against a free man, lest a serf should be in a better condition than a free man, since he ought to be in a worse condition. Likewise as well against the person who has given authority to the ejectors by precept, counsel, and by inferential help, as against him who has ratified the disseysine after it has been made, or because he has not amended the injury, when he has been applied to by a man personally with a living voice, or at least with a diligent request and a f. 171. diligent prosecution, provided, however, that he knew it as being present, or might have or ought to have known it, and so that there was not crass ignorance on his part, which might be, if all persons of his country knew that

esse factam, & ipse solus ignoraverit cùm præsens sit. In quibus casibus, cùm injuriam suorum non emendaverit, cùm possit & sciverit, incidit in assisam. Itē non solum ille qui facit & præcipit (ut prædictum est), verùm etiam ille qui statim & recenter ingreditur seysinam post disseysinam factam ab uno vel à pluribus, & ex quibus omnes vel quidam illorum fuerint principales disseysitores, & hoc sive ingrediatur de voluntate disseysitoris per donationē, vel per aliam translationē, sive contra voluntatem per disseysinam, & hoc ante impetrationem quandocunque. Et quid si non ejiciantur incontinenti & recenter? omnes sicut principales disseysitores incidunt in assisam, & omnes in brevi comprehendantur. Si autem fuerit diligens impetratio & diligens prosecutio, & post impetrationem factam seysinam ingrediantur, tunc refert utrum statim post disseysinam & impetrationem factam, vel ex longo intervallo, sed sive sit sic sive non, oportet quòd in brevi nominentur ex nova impetratione, quia ad quemcunque res pervenerit post impetrationem, cùm res per diligentem impetrationem & prosecutionem effecta sit litigiosa, ille qui eam sic receperit (quamvis in brevi non nominetur) illam restituere cogetur, & non tenetur ad pœnam ex disseysina, sed tantùm ad restitutionem, & sic imputari sibi ipsi debet quòd rem sic litigiosam recepit, nec excusat eum aliqua ignorantia, sed si cautè egerit dum fuerit in seysina, prospiciat sibi per breve de warrantia. Si autem disseysitus negligens fuerit ad impetrandum, & ad prosequendum, & res ante impetrationem fuerit ad alium translata, sive incontinenti sive p longum intervallum: omnes qui acceperint incidunt in assisam, quidā eorum quantū ad pœnam & restitu-

the disseysine had been made, and he alone was ignorant of it when he was present. In which cases since he has not amended the injury done by his people, when he could and knew of it, he becomes liable to an assise. Likewise not only he who does and directs (as above said), but also he who forthwith and recently enters upon seysine after a disseysine has been made by one or by several, and of whom all or some of them have been principal disseysors, and this whether he enters with the consent of the disseysor through a donation or some other transfer, or against his will by a disseysine, and this before any request. And what if they be not forthwith and recently ejected? All just like principal disseysors are liable to an assise, and let them all be comprised in the writ. But if there has been a diligent request made and a diligent prosecution, and after the request made they enter upon seysine, then it matters whether it has been so done immediately after the disseysine and the request made, or after a long interval; but whether it be so or not, it is requisite that they be named in the writ after a new request made, because to whomsoever the thing may come after the request made, since the thing has been made litigious by a diligent request made and a prosecution, he who has received it (although he be not named in the writ) will be compelled to restore it, and he is not liable to a penalty for the disseysine, but only to make restitution, and so he ought to blame himself for having received a thing which was under litigation, nor does any ignorance excuse him; but if he has acted cautiously, whilst he was in seysine, let him provide for himself by a writ of warranty. But if the party disseysed has been negligent in making request and in prosecuting, and the thing, before a request has been made, shall have been transferred to another, whether immediately or after a long interval, all who have received it are liable to an assise, some of them indeed as regards a penalty and restitution, according as it has

tionem, secundùm quod statim & recenter, quidam verò tantùm ad pœnam & non ad restitutionem, & quidam ad restitutionem & non ad pœnā, secundùm quod post intervallum feoffati fuerint, & ante impetrationem, sicut superi[9] in parte dictum est. Et si quidam ante impetrationem per longum intervallum feoffatus fuerit, vel disseysinam fecerit de re spoliata post intervallum, & si in brevi non nominetur, respondere non tenetur, nisi velit. Si autem sponte velit, non fit ei injuria propter voluntatem. Item incidunt in assisam non solùm unus sed plures, quidam principaliter & quidam secundariò, qui autem principales sunt & qui non, inferiùs dicetur. Item incidit in assisam non solùm ille qui facit nomine alieno, verùm etiam ille cujus nomine fit, dum tamen factum suorum & injuriam advocaverit, & illam fecerit esse suam. Potest etiam quis ejicere p̃sens cum familia, sicut potest p̱ se sine familia, & eodē modo familia sine eo, & dominus cum familia p̃sens & absens. Absens, ut si eo non præsente jubeat vel mādet, & sic autoritatē præstet ab initio. Item eo non præsente, non jubente, non mandante, nec autoritatem præstante ab initio, sed ex post facto ratum habente, vel cùm fuerit interpellatus injuriam non emendante, ut paulò ante dictū est. Et in quo casu principalis non tenebitur sine secūdariis nec è
f. 171 b. cōtra: quia quilibet incidit in assisam cū alio. Familia verò non potest restituere sine dño, quia p̱ factum eorum est in seysina, & ita non possunt restituere quāvis teneantur ad pœnam, domin[9] autem, cùm advocaverit, suam facit injuriam, & ita tenetur ad utrumq̱, ad restitutionem s. ad ad pœnā.[1] Si autem deadvocaverit & injuriam suorum emendaverit, non tenebitur nisi tantū ad restitutionē. Item qui factum advo-

[1] "et ad pœnam." MS. Rawl. C. 160.

been forthwith and recently, but some indeed only as regards a penalty, and not as regards restitution, and some as regards restitution and not a penalty, according as they have been enfeoffed after an interval, and before request made, as has been said above in part. And if some one before request made has been enfeoffed during a long interval, or has made a disseysine of a thing spoiled after an interval, and if he is not named in the writ, he is not bound to answer unless he is willing. But if he so wills of his own accord, no injury is done to him, on account of his willingness. Likewise they are subject to an assise not merely one but more, some as principals and others as accessories, but who are principals, and who not, will be explained below. Likewise he is liable to an assise not only who does a thing in another's name, but he in whose name it is done, provided he has avowed the act to be done by his people and the injury, and so has made it his own. For a person may eject being present with his family, as he may by himself without his family, and in the same way his family without him, and the lord with his family present or absent. Absent, as if when he is not present he bids or orders, and so furnishes authority from the commencement. Likewise when he is not present, nor bidding, nor ordering, nor furnishing authority from the commencement, but ratifying it after it has been done, or when he has been applied to, not amending the injury, as has been said a little above, and in which case the principal will not be liable without the accessories, nor the converse, because each becomes liable to an assise f. 171 b.
with the other. But a family cannot make restitution without the lord, although it may be liable to a penalty; but the lord, when he has avowed, makes the injury his own [act], and so he is liable to both, to restitution, for instance, and to a penalty. But if he has disavowed it, and has amended the injury done by his dependents, he will not be liable for any thing but restitution. Like-

caverit & injuriā suoī, non magis excusatur in hoc casu quantum ad disseysinā q̄ ille[1] qui jussu dejicit, q̄ excusaretur ab homicidio, si jussu alicujus occideret, cùm in hoc sit dñis obediendū,[2] nec excusat autoritas majoris, nec ille magis excusatur qui jussit, vel qui cōsilium adhibuit, si injuria p̄venerit ad effectum, aliī autem non, & nō refert utrum quis p̄priis manib⁹ ejiciat an p̄ alium, & unde si familia mea ex voluntate mea dejecerit, ego videor dejecisse, eodē modo si p̄curator meus, & cum omnib⁹ erit agendum. Si autē falsus fuerit p̄curator qui dejecit, non mecū erit agend̄ sed cū eo, nisi cū suum factū ratum habuero, quia ratihabitio in hoc casu cōparatur mandato. Dicitur enim q̄ recti⁹ est in maleficio, habitionē rati mandato comparari. Et notandū q̄ familiæ appellatio duos continet servos vel alios in numero, & ulteri⁹ trium vel plurium. Et si tantū unus dejecerit, adhuc videbitur familia dejecisse, & etiam familiæ appellatio eos cōplectitur qui loco servorū habentur, sicut sunt mercenarii & conductitii. Item tā liberi q̄ servi, & quib⁹ poterit imperari. Itē inter cætera videndū est quis sit ille qui dejicit, princeps s. ex potentia, vel aliquis pro eo vel nomine suo, vel judex qui malè judicaverit, vel privata p̄sona. Si autem princeps vel rex, vel alius qui superiorē nō habuerit nisi dñm, contra ipsum nō habebitur remediū p̄ assisam, imò tantù loc⁹ erit supplicationi ut factū suū corrigat & emēdet, q̄ si non fecerit, sufficiat ei p̄ pœna q̄ dñm expectet ultorē, qui dicit: mihi vindictā, & ego retribuā, nisi sit qui dicat, q̄ universitas regni &

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[1] "quam ille." MS. Rawl. C. 160 omits "quam."

[2] "cum in hoc non sit dominis | "obediendum." MSS. Rawl. C. 160 and 159. The edition of 1569 has "non sit."

wise he who has avowed the act and the injury of his dependents, is not more excused in this case as regards the disseysine, than he who by order ejected a person, than he would be excused from homicide, if by the order of any one he had slain a person, since in this obedience is [not] to be given to the lords, nor does the authority of a greater person excuse, nor is he more excused, who gave the order, or who gave advice, if the injury has taken effect, but otherwise not; and it does not matter whether a person has ejected with his own hands or by means of another, and hence if my family has ejected a person by my wish, I seem to have ejected him, in the same way in which my agent, and proceedings may be taken against all. But if it was a false agent who ejected, proceedings must be taken, not against me, but against him, unless when I have ratified his act, because in this case ratification is equivalent to a mandate. For it is said that it is right in a misdeed, that an act of ratification should be equivalent to a mandate. And it is to be noted, that the appellation "family" embraces two serfs or others in number, and more than three or more. And if only one has ejected, still the family seems to have ejected, and the appellation "family" embraces those, who are in the place of serfs, such as mercenaries and hirelings. Likewise as well freemen as serfs, and those who may be commanded. Likewise it is to be, amongst other things, seen who it was who ejected, a prince, for instance, in virtue of his power, or some one on his behalf or in his name, or a judge who has judged ill, or a private person. But if it be a prince or a king, or another who has no superior unless the Lord, there will be no remedy against him by an assise, on the contrary there will only be place for a supplication that he will correct and amend, which if he will not do, it must suffice for him to await the Lord the avenger, who says, "To "me vengeance, I will repay," unless there be some who says, that the body corporate of the realm and the body

baronagium suum hoc facere debeat & possit in curia ipsius regis.[1] Sed si alius ex facto & disseysina principis statim vel ex post facto in ꝑ seysina extiterit, quāvis talis incidat in assisam & in pœnam vel tantū ad restitutionē, secundùm q̄ seysina ad ipsum ꝑvenerit statim vel ex post facto, tamen sine principe conveniri non poterit ꝑ assisam: quia licèt ipse quodāmodo disseysinā fecerit, tamen non ꝑ se sed cum alio, s. cum principe, & ita q̄ sine eo respondere non potest, & ideo non procedit assisa. Indirectè tamē & quasi ex incidenti etiam sine brevi comprehendi poterit ꝑsona principis ad hoc q̄ factum suum emendet, vel in personam suam redundabit injuria manifestè. Utpote esto, quòd impetratur assisa tantùm super eum, ad quem res translata est, sine principe, & qui tenetur ad restitutionem & ad pœnam vel ad minꝰ ad restitutionē, & ipse respondeat quòd sine principe (qui fecit injuriam) per se vel suos respondere non debeat, quia ipse princeps per se fecit injuriā, vel ipsi duo simul, extunc erit factum & injuria in manu domini regis, qui dici debet in hoc facto quasi warrantus,[2] & extunc poterit (si voluerit) factum suum emendare, quasi à lege compulsus, & quasi in persona sua, cùm sit ei submissus, debet firmiter observare. Si autem ballivus vel servus nomine regis, capienda erit assisa, sed non erit procedendum ad judicium quousq̄ sciatur de voluntate regis.[3] Si quis autem fuerit à judice qui malè judicaverit disseysitus, sive hoc scienter fecerit sive ex imperitia, qualiter ꝑcedendum sit inferiꝰ dicetur de exceptionibꝰ.

f. 172.

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[1] "nisi sit qui dicat." This innovation upon the royal prerogative was established by the Provisions of Oxford, A.D. 1258, which were, however, annulled six years afterwards by the arbitration award of Louis IX. of France, Dec. 6, A.D. 1263.

[2] "quasi warrantus." The liability of the king to be called as a warrantor is considered more fully in a subsequent chapter, De Warrantia. Lib. v. ch. 2, § 9, f. 382.

[3] "de voluntate regis." The same rule as to the king's pleasure is laid down in ch. 31, § 2, of the present book, f. 212.

of barons ought to do this and may do it in the court of the king himself. But if another by the act and disseysine of the prince immediately or after a time has been in seysine, although such a person is liable to an assise and to a penalty, or only to restitution, according as the seysine has accrued to him forthwith or after a time, nevertheless he cannot be convened without the prince by an assise; for although he has himself somehow made a disseysine, nevertheless he has not done it by himself but with another, to wit, the prince, and so that he cannot answer without him, and accordingly the assise cannot go on. Indirectly, however, and as it were incidentally without a writ, the person of the prince may be comprised for this purpose that he may amend his own act, or the injury will manifestly redound against his person. As for instance, let it be that an assise is requested only against him, to whom the thing has been transferred, without the prince, and who is liable to restitution and to a penalty, or at least to restitution, and he should answer that he ought not to answer by himself or by his dependents without the prince (who did the injury), because the prince himself did the injury by himself, or the two parties together, thereupon the act and the injury will be in the hand of the lord the king, who ought to be termed in this act as it were a warrantor, and thereupon he will be able (if he should be willing) to amend his own act, as if compelled by law, and as if in his own person, since he is subject to it, he ought firmly to observe it. But if a bailiff or serf in the name of the king, the assise will have to be held, but it will not have to be proceeded to judgment, until f. 172. it be known respecting the will of the king. But if any one has been disseysed by a judge, who has judged ill, whether he has done this knowingly or from inexperience, it will be stated below in the treatise on excep-

Possunt etiam plures teneri & cadere in assisam sicut unus, & quorum unus vel plures possunt esse principales disseysitores, & quidā secundarii. Principales, secundꝺ q quidam rem disseysitam tenuerint in cōmuni ante partitionem, vel secundùm q partita fuerit inter plures qui culpabiles sunt de facto principaliter, vel secundùm q postea & post disseysinam in plures manus statim devenerit, vel inter plures partita extiterit statim post disseysinam. Itē sicut plures possunt esse principales[1] disseysitores & unus, ita plures possunt esse rei disseysitæ disseysitores &[2] detentores post disseysinam & unꝰ, sive possidere inceperint statim post disseysinam qualitercunqꝫ, sive ex intervallo sive nō, sive ante impetrationem sive post impetrationem, dum tamen si post impetrationem & negligentem ꝑsecutionem possidere inceperint, oportebit eos in brevi comprehendi, ac si ad eos translata esset res ante impetrationem, quia res, quæ ab initio effecta fuit litigiosa ꝑ diligentē impetrationē, effici possit non litigiosa ꝑ negligentem ꝑsecutionem, oportebit enim utramque esse diligentem, saltem quousqꝫ plegii de ꝑsequēdo inveniantur, licèt captio assisæ differatur, quia extunc omnino erit litigiosa. De hac materia infrà pleni[2] de exceptionibus.

Cap. XI.

1. Contra quem non competit assisa.

Dictum est suprà, contra quem competit assisa, nunc autem dicendum contra quē non cōpetit. Et sciendū, q contra ipsum non competit, qui injuriam sive disseysinam nō fecit. Immunis enim esse debet à pœna, qui

[1] "principales," omitted MS. Rawl. C. 160.

[2] "disseysitores et," omitted, *id.*

tions how proceedings are to be had. Likewise several persons may be liable to and may fall into an assise just as one person, and of whom one or more may be principal disseysors, and some secondary. Principal, according as some have held the thing disseysed in common before partition, or according as it has been parted amongst several persons who are culpable of the act principally, or according as afterwards and after the disseysine it has passed forthwith into many hands, or it has been parted amongst several persons immediately after the disseysine. Likewise as there may be several principal disseysors and one [only], so there may be several disseysors and detainers of a thing disseysed after the disseysine and one [only], whether they have begun to possess immediately after the disseysine in any way whatever, or after an interval or not, whether before a request made or after a request, provided, however, if they have begun to possess after a request made and a negligent prosecution, it will be requisite that they be comprised in the writ, as if the thing had been transferred to them before a request had been made, because the thing which has been rendered from the beginning litigious after diligent request made, may be rendered not litigious by a negligent prosecution, for it will be requisite that both be diligent, at least until sureties to prosecute are found, although the holding of the assise may be deferred, because thenceforward it will be in all respects litigious. On this subject a fuller discussion will be had below in treating of exceptions.

Chapter XI.

1. Against whom an assise does not lie.

It has been discussed above, against whom an assise lies, now we will consider against whom it does not lie. And it is to be known that it does not lie against a person, who has not done an injury or a disseysine. For he ought to be exempt from all penalty, who is exempt

immunis erat à culpa, quāvis quis teneatur aliquando ad restitutionē, licèt non ad pœnam, nisi p injusta detentione, sicut ille qui feoffatus est à disseysitore p longum intervallum, vel qui disseysinā fecit primo disseysitori per longū intervallum post disseysinam, & qui à vero domino sine judicio disseysiri non potest, quia diu ante secundā disseysinā seysinam suam amisit p negligentiam, utramq; vz. naturalem & civilem, & quāvis à suo disseysitore statim ejici possit & recenter & impunè. Item non tenetur aliquis hæres de facto, s. de disseysina antecessoris sui quoad pœnam disseysinæ, licèt teneatur ad restitutionem, & hoc nisi lis contestata fuerit cum suo antecessore, sicut alibi dicetur. Item nec successor ex facto prædecessoris sui, nisi modo quo prædictum est, & hoc maximè si prædecessor, suus in brevi nominetur sub nomine officii vel dignitatis, secus autem est sub nomine proprio, quia sub diverso nomine non respondebit.

2. Si quis nomine domini sui fecerit disseysinam.

Cum aliquis abbas, vel prior, vel dominus vel alia persona quæcunque ex facto & injuria suorum incepe-
rit possidere, cùm facta eorum advocaverit, & sic in seysina ante restitutionem obierit, quæritur an eorum successores vel hæredes ad restitutionem teneantur, cùm possint restituere, licèt non teneantur ad pœnam, sicut antecessor teneretur vel prædecessor. Hæres autem tenetur quoad restitutionem, sed per aliud breve
f. 172 b. de ingressu. Et eodem modo successor sub nomine dignitatis, si nomē proprium prædecessoris in brevi non fuerit expressum, quia semper eadem est dignitas, licèt diversum nomen. Si autem nomē proprium prædecessoris in brevi de nova disseysina incertum[1] fuerit, non tenebitur successor per tale breve, sed p breve de ingressu, sicut suprà dicitur de hærede: nisi fortè idem

[1] "incertum." This reading is also the reading of MS. Rawl. C. 159; but MS. Rawl. C. 160 has "ins. non fuerit" which may be extended, "insertum non fuerit."

from all fault, although sometimes a person may be liable to make a restitution, although not to a penalty, except for an unjust detention, like the person who has been enfeoffed by a disseysor after a long interval, or who has made a disseysine against the first disseysor at a long interval after the disseysine, and who cannot be disseysed by the true lord without a judgment, because long before the second disseysine he has lost his seysine by negligence, both kinds of seysine, natural and civil, and although he may be ejected forthwith by his disseysor and recently and with impunity. Likewise an heir de facto is not liable, to wit concerning the disseysine of his ancestor as regards the penalty of the disseysine, although he is bound to restitution, and this unless a suit has been contested with his ancestor, as shall be explained elsewhere. Likewise no successor for the act of his predecessor, unless in the manner as aforesaid, and this chiefly, if his predecessor has been nominated in the writ by the name of his office or his dignity, but otherwise if by his own proper name, because he shall not answer under a different name.

2. If a person has made a disseysine in the name of his lord.

When any abbot or prior or lord or other person whatever has begun to possess from the act and injury of his dependants, when he has avowed their acts, and and so has died in seysine before restitution, it is questioned whether their successors or heirs are liable to make restitution, when they can restore, although they are not liable to a penalty, as their ancestor or predecessor would have been. But the heir is liable as regards restitution, but by another writ of entry. And in the same way his successor under the name of his dignity, if the proper name of his predecessor has not been used in the writ, because the dignity is always the same, although the name be diverse. But if the proper name of a predecessor has been inserted in the writ of novel disseysine, his successor will not be liable by such a writ, but by a writ of entry, as has been above f. 172 b.

habuerit nomen proprium prædecessor & successor, quod bene potest sustineri, ut infrà dicetur pleniùs. Cùm verò quis fecerit disseysinam nomine alieno, ut prædictum est, refert utrum domini præsentes fuerint in provincia, ita quòd adiri possint de facili, vel extra regnum. Si autem adire possint de facili, adeundi sunt, ut sciatur utrū injuriam emendare voluerint vel non, cùm de injuria eis constiterit : si autem non, erunt principales disseysitores & in brevi nominandi sunt primò & principaliter, cùm hoc advocaverint. Si autem verbo deadvocaverint expressè interpellati, & hoc non emendaverint, sed opere fecerint contrarium, prudenter & scienter utendo & non restituendo, adhuc illud idem erit dicendum quod superiùs dictum est, & hoc si ante impetrationem. Si autem post impetrationem fuerint interpellati, tunc refert utrum dominus nominetur cum suis vel non. Si autem nominetur, & posteà deadvocaverit, fiat idem q̃ suprà, quia tunc facit injuriā suā propriā, & incipit esse primus & principalis disseysitor per ratihabitionem, quæ retrotrahitur ad disseysinam & ad primum factum. Si autem in brevi nominatus non fuerit, si postmodum advocaverit, bene se poterit ponere in assisam de voluntate sua, cogi autem non debet. Et unde si noluerit respondere sine brevi, alio brevi opus erit. Item si non fuerit interpellatus nec in brevi nominatus, nihilominùs procedit assisa versus suos in absentia sua. Et si post captionem assisæ redierit & factum advocaverit, inprimis sit in misericordia cū suis, & nullum aliud habebit remedium, nisi q̃ agat de convictione contra juratores, si

said respecting the heir, unless by chance the predecessor and the successor have had the same proper name, which may be well sustained, as will be explained more fully below. But when a person has made a disseysine in another person's name, as aforesaid, it is of importance whether the lords have been present in the province, so that there could be easy access to them, or were out of the kingdom. But if there was easy access to them, recourse must be had to them, that it may be known whether they are willing to amend the injury or not, when they have been clearly informed of the injury. But if they are not willing, they will be the principal disseysors and are to be named first in the writ and as principals, when they have avowed this. But if they have verbally disavowed after having been expressly interpellated, and have not amended it, but in fact have done the contrary by using it advisedly and knowingly, and by not making restitution, the same thing will have to be said as above said, and this if before request made. But if after request made they have been interpellated, then it is of importance whether the lord is named with his dependants or not. But if he be named and afterwards has disavowed, let the same be done as above said, because he then makes the injury his own act, and he begins to be the first and principal disseysor by his ratification, which is referred back to the disseysine and the first act. But if he has not been named in the writ, if he has afterwards avowed it, he may well place himself on the assise of his own will, but he cannot be compelled. And hence if he should be unwilling without a writ, there will be need of another writ. Likewise, if he has not been interpellated, nor named in the writ, nevertheless the assise proceeds against his dependants in his absence. And if after the holding of the assise he has returned and has avowed the act, let him be in the first place amerciable with his dependants, and he shall have no remedy, except that he may proceed for a conviction [of perjury]

voluerit, & in quibus casibus omnibus cùm advocaverit, & ante captionem assisæ moriatur, successor ejus non tenebitur ad pœnam, nisi tātùm ad restitutionem per breve de ingressu, nec alii qui fecerint tenebuntur. Si autem absentes fuerint omnino vel præsentes deadvocaverint & statim moriantur, semper tenebuntur principales disseysitores illi qui fecerunt, & ꝑcedet assisa contra eos usq; ad creationem successorum. Cùm autē successor creatus fuerit ante captionem assisæ, tunc erit successor vel hæres in eadem causa, in qua fuit prædecessor, quod deadvocare poterunt vel advocare, cùm de facto suorum incipiant possidere. Sed refert utrum ꝑ breve impetratum contra prædecessorem propter diversitatem personarum. Et unde videndum utrum impetratum fuerit versus prædecessores, abbates vel priores tantùm sub nomine dignitatis, vel simul sub nomine proprio, vel nomine[1] dignitatis, & si sub nomine proprio, tunc refert utrum idem fuerit nomen p̄decessorum & successorum vel diversum, ut infrà dicetur pleni[2]. Et generaliter quicunq; illorum moriatur, sive ille qui fecit, sive ille cujus nomine fit, cùm advocaverit, cadit breve & assisa sub nomine dignitatis & sub nomine proprio, & alio brevi opus erit.

Cap. XII.

f. 175. 1. Cui fieri debet querela.

Dictū est suprà, ad quē ꝑtineat querela de disseysinâ facta, & ad quē non, nunc autē dicend̄, cui fieri debeat

[1] "et nomine," MSS. Rawl. C. 160 and 159.

against the jury, if he wishes; and in all which cases, when he has made an avowal and dies before the holding of the assise, his successor will not be liable to a penalty except only to restitution by a writ of entry, nor shall the others, who have done it, be liable. But if they have been altogether absent, or when present have disavowed it and should die immediately, the principal disseysors, those who did it, will always be liable, and an assise shall proceed against them until the creation of successors. But when a successor has been created before the holding of an assise, then the successor or the heir shall be in the same cause in which his predecessor was, that they may avow or disavow, since they begin to possess from the act of their dependants. But it is of importance whether it is by a writ obtained against the predecessor, on account of the diversity of persons. And hence it is to be seen whether it has been obtained against predecessors, abbots or priors only under their name of dignity, or at the same time with their proper name and their name of dignity; and if under their proper name, then it is of importance whether the name of the predecessors and of the successors has been the same or different, as will be explained more fully below. And generally whoever of them should die, whether he who has done it or he in whose name it was done, when he has avowed it, the writ and the assise under the name of dignity and the proper name fails, and there will be need of another writ.

Chapter XII.

f. 175.[1]

To whom complaint ought to be made.

We have said above, to whom belongs a complaint concerning the making of a disseysine, and to whom not,

[1] In both the printed editions of 1569 and 1640 the numbering of the folios is carried forward from 172 directly to 175, the intermediate numbers 173 and 174 being omitted. No explanation of the fact is given in either edition.

querela, & ad quē recurrendū erit, cū disseysit^{9} utrāq; amiserit poss. naturalē & civilē, & cū seysinā resumere non possit autoritate ꝑpria, cū illā semel amiserit. Querela autē fieri debet ei qui jurisdict' habet, sicut principi, & non omni qui habet jurisdictionē, nisi cum jurisdictione habeat coertionē, q̄ possit judiciū suū executioni demandare. Non archiepisc. nec episc. nec aliis, licèt jurisd̄ habeant in quibusdam. In laico verò feodo cognitionē non habent neq; coertionem, quia si archiep. vel episc. vel alia ꝑsona ecclesiastica de laico feodo cognosceret vel judicaret, si judiciū ꝑ se exequeretur, cōpeteret conī eos assisa novę diss., quia quamvis judicium interveniret, licèt justū esset omnino, tamen, quia non haberet jurisdict. in talib^{9} nec coertionem, non valeret. Si autem vic. hoc demandaret exequendū, impune eis non obediret, q̄ si faceret, simul cū aliis caderet in assisam. Sed nonne poterit judex ecclesiastic^{9} de laico feodo cognoscere ratione fidei interpositæ? Non, quia si sic faceret, non haberet coertionē nec judicii executionē, & cùm in judicio ecclesiastico cognoscatur de fidei interpositione, non tamen ꝑpter hoc mutatur jurisdictio vel cognitio super principali, q̄ est de laico feodo ꝑpter q̄ incidens est principali[1] q̄ est fidei interpositio, nec illud quod pri^{9} & maj^{9} est & principale, trahi debet ad forum alienum sive vetitū, ꝑpter id q̄ min^{9} est, & posteri^{9}, & incidens principali vel emergens. Sicut vice versa, ad forum secularē trahi nō debet ꝑ id q̄ min^{9} est & non prin-

[1] "propter incidens principali." MSS. Rawl. C. 160 and 159.

we must now discuss to whom a complaint ought to be made, and to whom recourse will have to be made, when the party disseysed has lost both possessions, the natural and the civil, and since he cannot resume seysine of his own authority, when he has once lost it. But a complaint ought to be made to him who has jurisdiction, as to the prince, and not to every one who has jurisdiction, unless he has with jurisdiction coercion, that he can commit his judgment to execution. Not to an archbishop, nor to a bishop, nor to others, although they have jurisdiction in certain things. But they have no cognisance nor coercion in a lay fee, because if an archbishop or a bishop or another ecclesiastical person were to hold cognisance or judgment concerning a lay fee, if he should execute judgment by himself, an assise of novel disseysine would lie against them, because although a judgment has intervened, however just it may be, nevertheless, because he had not jurisdiction in such matters nor coercion, it would not be valid. But if the viscount were to order it to be executed, they would be disobeyed with impunity, and if he were to do so, he would be liable, with the others to an assise. But cannot the ecclesiastical judge take cognisance of a lay fee by reason of the interposition of a promise? No, because if he did so, he would not have coercion, nor the execution of the judgment, and when cognisance is exercised in an ecclesiastical court respecting the interposition of a promise, the jurisdiction and cognisance of the principal question is not thereby changed, which is concerning a lay fee, on account of which there is incident to the principal question that there is the interposition of a promise, nor ought that which is the prior and greater and principal subject to be drawn away to a foreign or forbidden tribunal on account of that which is of minor and later origin, and incident to or emergent out of the principal subject. As in the converse case, that which is the first and principal subject in an ecclesiastical court cannot be

pale id, q primum & principale est in foro ecclesiastico, ut si ob causam matrimonii pecunia ꝑmittatur, licèt videatur prima facie q cognitio super catallis & debitis pertineat ad forum seculare, tamen ꝑpter id q majus est & dignius trahitur cognitio pecuniæ promissæ & debitæ ad forum ecclesiasticum, & ubi locum non habet ꝓhibitio, cùm debitum sit de testamento vel matrimonio. Eodem modo videretur q trahi deberet ad forum seculare fidei interpositionis cognitio, q tamē esse non poterit, cùm judex secularis ꝑ fide læsa injungere non potest pœnitentiam, ne falcem suam ponat in messem alienam. Et similiter videri poterit aliàs q id q majus est trahit ad se id q min⁹, ut si quis in curia domini regis implacitatus fuerit ab aliquo super transgressione ab aliquo, & ab eodē appellatus super eodem facto in cō̃ vel coram justiī de banco, remitti debet placitum super transgressione ad cō̃ vel ad bancum, nec trahi debet appellum ad judicium sive cognitionem super trāsgressione, sed è converso: quia id q majus est trahit ad se id quod min⁹, & non è contrario, & hoc sufficit ad præsens exempli causa.

Cap. XIII.

1. Quando fieri debeat querela.

Dictum est suprà, cui fieri debeat querela, nunc autem dicendum erit quando, & sciendum, quòd statim & sine mora, cùm diligens esse debeat impetratio & diligens prosecutio, secundùm quod superiùs dictum

drawn away to the secular court on account of something, which is of minor importance and not the principal subject, as if money be promised in consideration of matrimony, although it might appear at first sight that the cognisance of a question of chattels and debts pertains to the secular court, nevertheless on account of that which is the greater and more dignified matter the cognisance of the money promised and due is drawn into the ecclesiastical court, and where a prohibition is not applicable, since it is a debt founded upon a testament or upon matrimony. In the same way it might seem that the cognisance of a promise interposed ought to be drawn into the secular court, which however it cannot be, since the secular judge cannot enjoin for a breach of faith penance, lest he put his reaping hook into another person's harvest. And it may be in like manner seen in other matters that that which is the greater draws to itself that which is the less, as if a person shall have been impleaded in the court of the lord the king by some one respecting a trespass made by some one, and shall be [criminally] charged by the same party upon the same act in the county court or before the justices of the bench, the plea respecting the trespass ought to be remitted to the county court or to the bench, nor ought the criminal charge be drawn into the judgment or cognisance respecting the trespass, but the converse: because that which is greater draws to itself that which is less, and not contrariwise, and this suffices for the present for the purpose of example.

Chapter XIII.

1. When a complaint ought to be made.

We have said above, to whom a complaint ought to be made, now then we must discuss, when it ought to be made, and it is to be known, that it should be made immediately and without delay, since the request should be diligent and the prosecution diligent, according to what

f. 175 b. est, cùm desides & sui juris contẽptores non juvat juris beneficium, & vigilantib⁹ & non dormientibus jura subveniunt, & ne ante impetrationẽ vel diligentẽ ꝑsecutionem res disseysita transferatur ad alium, ꝑpter q̃ fiat difficilior ꝑsecutio, & quæ si diligens fuerit, perpetuatur ꝓ hoc actio & detur hæredib⁹, & cõpetit in hæredes ꝓ bñe de ingressu cum clausula vel sine, quãtũ ad pœnam vel restitutionem, secundùm q̃ inferi⁹ dicetur, & secundùm q̃ res translata fuerit ad alium ante impetrationẽ vel post, secundùm q̃ fieri potest multis modis, sicut continuò videri poterit in sequentibus.

Cap. XIV.

1. Si res disseysita post disseysinam ad alium transferatur per disseysitorem unum vel plures.

Si post disseysinã factã ab uno vel à pluribus res ad alium transferatur, ad unũ vel ad plures. Ad plures autem simul vel successivè, de ꝑsona in ꝑsonã, sive de voluntate disseysitoris, sive cõñ voluntatẽ suã ꝓ disseysinã, & hoc si statim post disseysinã & sine intervallo antequã disseysitus sibi ꝓ bñe vel ꝓ longum intervallum ꝓquisiverit ꝓ negligentiam suã, cùm cõmodè sibi ꝓquirere posset, si vellet. In iis casib⁹ omnib⁹, oportet q̃ omnes, ad quos res translata fuerit ante impetrationem, cum primis & principalib⁹ disseysitoribus in brevi nominentur, ut superi⁹ dictum est, sive ꝑpter pœnã sive ꝑpñ restitutionẽ, alioquin non recuperabit disseysitus. Principales verò disseysitores ꝑpter factum & ꝑpter injuriam, & illi eodẽ modo ad quos res trãsferañ de volunñ disseysitoris, si statim possessionẽ nacti fuerint de re translata post disseysinam, & ad restitutionẽ tenentur & ad pœnam, si autem

has been said above, since the benefit of right does not aid slothful persons and those who contemn their own right, and law helps the watchful and not the sleepers, and lest the thing disseysed be transferred to another before request made and diligent prosecution, whereby the prosecution becomes more difficult, and which, if it has been diligent, thereby the action is perpetuated and given to the heirs, and the heirs are entitled to a writ of entry with a clause or without, as regards a penalty or restitution according to what will be said below, and according as the thing will have been transferred to another before request made or after, according to what may be done in many ways, as may be seen immediately in what follows. f. 175 b.

Chapter XIV.

If after a disseysine made by one or more a thing be transferred to another, to one or more. To more also at the same time or successsively, from person to person, whether with the consent of the disseysor or without his consent by a disseysine, and this if forthwith after the disseysine and without an interval, before the person disseysed has claimed it for himself after a short or a long interval through his negligence, when he could have conveniently claimed it, if he chose. In all those cases it is requisite, that all those, to whom the thing has been transferred before request made, be named in the writ with the first and principal disseysors, as has been said above, whether on account of the penalty or on account of restitution, otherwise the disseysed party will not recover. But the principal on account of the act and the injury, and those in the same way to whom the thing has been transferred with the consent of the disseysor, if they have immediately obtained possession of the thing transferred after the disseysine, are liable both to restitution and to a penalty, but if after a long in- 1. If the thing disseysed be transferred after the disseysine to another by one or more disseysors.

post longum intervallum, aliud erit, quia illi non sunt disseysitores: quia longū tempus eos excusat ꝑpter negligentiam disseysiti, ꝑ q disseysitus amisit utramq, possessionem, vel ꝑpter negligentem ꝑsecutionem, licèt diligens fuerit impetratio ꝑ q res desinit esse litigiosa. Item si statim & sine intervallo res disseysita ad alium transferatur sive de voluntate disseysitoris sive contra ꝑ disseysinam, omnes tenentur, & incidunt in assisam, & nullus poterit sine judicio disseysiri, nisi hoc fiat incōtinenti, habita tñ tali distinctiōe q si ille, qui ꝑ longū temp⁹ ante impetrationē ingressus fuerit possessionem, si cōstiterit ꝑ juratā vel cōfessionē feoffatoris sui q taliter inde feoffatus fuerit, sine alio brevi & sine placito recupabit excābiū suū, cùm ver⁹ dñs per assisam recuperet teñtum suū, cùm hujusmodi cōfessio vel cognitio sit quasi quoddā incidens in assisa, si ꝑsens fuerit, si autē absens, tunc solvetur tenenti[1] recuperare suū quoad excāmbiū cùm talis redierit, si habeat unde fiat excāmbiū. Et q tā ille (licèt disseysinam nō fecerit) q ille principalis, qui re vera disseysitor est, simul nominari debeant in brevi, & q nullus sine alio possit conveniri, ratio facit ad hoc potentissima, quia principalis disseysitor licèt disseysinam fecerit, non tñ potest rem restituere, nec ille ad quem translata est res, licèt disseysinam non fecerit, potest tamen rem restituere, sed tamen sine judicio & brevi ejici non poterit, nisi gratis se ponat in assisam (ut suprà) cùm in brevi non nominetur. Si autem statim ante impetrationem vel post, in brevi nominati vel nō

[1] "salvetur tenenti," MSS. Rawl. C. 160.

terval, it will be different, because they are not disseysors, because a long time excuses them on account of the negligence of the party disseysed, whereby the party disseysed has lost both kinds of possession, or on account of his negligent prosecution, although his request has been diligently made, whereby the thing became the subject of a suit. Likewise if immediately and without an interval the thing disseysed should be transferred to another, whether with the consent of the disseysor or against it by disseysine, all are liable and become subject to an assise, and no one will be able to be disseysed without a judgment, unless this be done forthwith, such a distinction however having been made, that if he who has entered into possession for a long time before request made, if it be established by a jury or by the confession of his feoffor that he was so enfeoffed therewith, he shall recover without any other writ and without a plea his compensation, when the true lord recovers by an assise his tenement, since a confession of this kind or a recognition is as it were an incident in the assise, if he was present, but if absent, then there shall be saved to the holder of the land the right to recover his own as regards the compensation, when he shall have returned, if he have wherewith compensation may be made. And as well he (although he did not make the disseysine) as the principal party, who is in reality the disseysor, ought to be named together in the writ, and that no one without the other can be convened, follows from this most potent reason, because the principal disseysor, although he has caused the disseysine, cannot however restore the thing, nor can he to whom the thing has been transferred, although he has not made the disseysine, restore the thing, but he cannot be ejected with a judgment and a writ, unless he gratuitously puts himself upon an assise (as above), when he is not nominated in the writ. But if forthwith before request made or after, having been named in the writ or not named, with

f. 176. nominati, de volūtate disseysitoris primi vel contra ingressi fuerint seysinā, nullū talibus cōpetit remediū de escambio, quamvis sine judicio & sine brevi ejiciantur, sive post tēpus in brevi nominati p assisam vel p officium judicis excambium consequantur, ex quo recenter ingressi sunt rem vitiosam post disseysinā, non subvenitur eis, ut suprà in alio casu, in odium disseysinæ, sed sibi ipsis ꝑspiciant dum fuerint in seysina p bŕe de warrantia chartæ, quia donatio valida est quantū ad disseysitorem & suum feoffatum, licèt invalida quātum & disseysitū. [1] Si autem res translata fuerit ad alium post diligentē impetrationem & diligentem ꝑsecutionem incontinenti sive post intervallum, non est necesse quòd fiat impetratio super illos ad quos res translata est, cùm semel fuerit impetratum, & res effecta litigiosa prædicto modo, vel postquam disseysit^{9} statim & incontinenti post disseysinam ante rem translatam iter arripuerit versus curiam ad impetrandum, cùm sic etiam effectum sit tenementum litigiosum, & sic plus est appellare facto quàm verbo, sive hoc factum fuerit statim, sive post aliquod intervallum post arreptum iter, dum tamen disseysitus diligens fuerit ad impetrandum & ꝑsequendum, & ita q ei nulla imputari possit negligentia. Non oportet tales ad quos res translata fuerit post talem diligentiā, nullo habito respectu ad datam, in brevi cōprehendi, quia ex quo sciunt & scire possunt & debēt disseysitum diligentem fuisse ad impetrandū & ꝑsequendum, scire debent p consequens rem effectā esse litigiosam, & etiā ꝑpter hoc temp^{9} non currere conť disseysitum,

[1] "Quantum ad disseysitum." MS. Rawl. C. 160.

the consent of the first disseysor or against it, they have entered into seysine, such persons are not entitled to any remedy by way of compensation, although they be ejected without a judgment and without a writ, or if after a time having been named in the writ they obtain compensation by an assise or by the office of the judge, since they have recently entered on a faulty thing after the disseysine, they are not succoured, as above in the other case, in hatred of the disseysine; but let them provide for themselves whilst they are in seysine by a writ concerning the warranty of their charter, because the donation is valid as between the disseysor and his feoffee, although invalid as respects the party disseysed. But if the thing has been transferred to another after a diligent request and a diligent prosecution forthwith or after an interval, it is not necessary that a request should be served upon those to whom the thing has been transferred, when once a request has been made, and the thing has been litigious in the aforesaid manner, or after the party disseysed immediately and forthwith after the disseysine, before the thing has been transferred, has set off on his way to the court to request a writ, since the tenement has thus also been rendered litigious, and thus it is more effective to appeal by an act than by a word, whether this has been done forthwith or after an interval, after the journey has been commenced, provided only the party disseysed has been diligent to make a request and to prosecute, and so that no negligence can be imputed to him. The parties to whom the thing has been transferred after such diligence, no respect being had to the date, ought not to be comprehended in the writ, because since they know or are able to know and ought to know that the party disseysed has been diligent in requesting a writ and in prosecuting, they ought to know as a consequence that the thing has been rendered litigious, and also on that account that time does not run against the party dis- f. 176.

cū disseysitor nō extiterit, nec contemptor sui juris. Igitur ad quemcunq; res post talem diligentiā ꝓvenerit, non cadit breve, nec oportebit iterum impetrare nec tales in brevi inserere, quia sive nominati fuerint sive nō, sive res statī trāsferatur ad eos sive post intervallum, semper tenentur ad restitutionem, nec expectari debet temp^{9} post assisam captam nec differri judicium, quo min^{9} statim fiat restitutio disseysito, cùm omnes sunt in culpa & disseysina, tum ꝑpter recentem translationem, tum ꝑpter rem effectam litigiosam ꝑ diligentem ꝑsecutionem, & hoc dico, quia solebant quidā differre judicium, ut dum tales essent in seysina ꝑ breve de warrantia (cùm ꝑ officium judicis nō possent), possent tamen sibi ꝓvidere ad excābium, & semper ꝓcedit assisa super eum, qui tenuit tempore impetrationis vel diligentis prosecutionis. Esto etiam, quòd aliquis impetraverit diligenter & propter aliquem defectum cadit primum breve, cùm fortè ineptè sit conceptum vel alio modo vitiosum q stare non possit, & disseysitus incontinenti impetrare incipiat aliud breve, si pendente impetratione secunda, postmodum sit tenementum ad alium translatum, & diligens fuerit disseysitus in impetrando & prosequendo, non valet translatio ad hoc quòd illos, ad quos transfertur tenementum, oportet in brevi nominare, sicut in primo casu: quia primus & principalis semper respondebit sine eis, quasi præventus. Nihilominus tamen si voluerit poterit disseysitus omnes convenire. Item si disseysitus diligens fuerit

seysed, since a disseysor has not appeared nor a contemnor of his right. Therefore to whomsoever the thing has come after such diligence, the writ does not fail, nor will it be necessary to obtain a fresh writ, nor to insert such persons in the writ, because whether they are named in it or not, whether the thing be transferred to them forthwith or after an interval, they are always liable to make restitution, nor ought any interval of time to be awaited after the assise has been held, nor the judgment deferred, so that there should not be restitution made at once to the party disseysed, since they are all in fault and in disseysine, as well on account of the recent transfer, as on account of the thing having been made litigious by a diligent prosecution: and this I say, because some persons are accustomed to delay the judgment, that whilst they were in seysine they might be able to provide for themselves the means of compensation by a writ concerning the warranty (since they could not by the office of the judge); and an assise always proceeds against him, who held the land at the time of the writ having been obtained or of the diligent prosecution of it. Let it be also, that a person has obtained a writ with diligence, and the first writ fails from some defect, since it has been drawn up clumsily, or in some other way is faulty that it cannot stand, and the party disseysed has without delay begun to obtain another writ, if, whilst he is suing out the second writ, the tenement is afterwards transferred to another person, and the party disseysed has been diligent in suing out a writ and in prosecuting, the transfer is not of validity for the purpose, that it should be requisite to name in the writ the parties to whom the tenement has been transferred as in the first case, because the first and principal disseysor shall always answer without them, as if anticipated. Nevertheless, however, if the party disseysed chooses he may convene all the parties. Likewise if the party disseysed has been diligent in

in impetrando, negligens autem in prosequendo, durante negligentia per aliquod tempus, quia supprimit breve, vel alio modo non prosequitur cùm possit, per
f. 176 b. negligentiam & moram suam efficitur res non litigiosa p negligentem ꝑsecutionem, quæ ab initio litigiosa fuit p diligẽtem impetrationem. Et si in tali mora res ad aliū translata fuerit, cadit primum breve, & oportebit aliud impetrare, & omnes tam primū & principalem disseysitorem q illos ad quos res translata fuerit in brevi comprehendere. Si autem in omni parte intervenerit diligentia, & breve liberatū fuerit vic. & plegii de prosequendo inventi, & disseysitores attachiati, licèt assisa statim p hoc[1] non capiatur, & per hoc[2] efficietur res litigiosa imperpetuum, & quantum ad disseysitores illos, & quātū ad suos hæredes si illi moriantur, & si res ad alium transferatur in vita eorum, non oportebit omnes nominare, ut prædictum est. Item transfertur quandoq; res ad alium non ut feoffamentum, vel ut liberum tenementum, sed ad terminum fortè annoꝝ, vel sic: videlicet donec ille ad quem transfertur perceperit inde tot vesturas, vel quandiu tenementum illud possit excoli, & bladum portare, sicut contingit in communia pasturæ, ubi dominus fundi, vel ille qui se gerit pro dño cùm non sit, & fecerit disseysinam, & alii communiam clamaverīt, & sic cōponunt inter eos, q ille, qui cōmuniam clamat, possit aliquam partẽ imbladare cum disseysitore, & disseysitus super eum, qui se gerit rei dñm, recuperat, recuperat versus alios qui ingressi sunt p disseysitorem ad terminū, vel donec, ut prædictū est, cum imbladatione, licèt non nominentur in brevi: & hoc ideò dico, quia liberum tenemen-

[1] "per hoc," omitted, MS. Rawl. C. 160.

[2] "et per hoc," "et" omitted, *id.*

obtaining a writ, but negligent in prosecuting, his negligence lasting for some time, because he suppresses the writ, or in some other way does not prosecute, when he can, by his negligence and delay the thing is rendered not litigious through his negligent prosecution, which at f. 176 b.
the beginning was litigious through his diligent suing out of the writ. And if in such delay the thing has been transferred to another, the first writ fails, and it will be requisite to sue out another, and to comprise in the writ all, as well the first and principal disseysor, as those, to whom the thing has been transferred. But if diligence has intervened in every part, and the writ has been delivered to the viscount, and sureties found to prosecute, and the disseysor attached, although the assise may not thereupon be forthwith held, the thing will be rendered litigious for ever, both as regards the disseysors, and as regards their heirs, if they should die; and if the thing should be transferred to another person during their lifetime, it will not be requisite to name them all in the writ, as above said. Likewise a thing is sometimes transferred to another not as a feoffment, or as a free tenement, but perhaps for a term of years, or on these terms, to wit, until he, to whom that is transferred, shall have derived therefrom so many vestures, or as long as that tenement can be cultivated and bear grain, as happens in a common of pasture, where the lord of the ground, or he who holds himself out to be lord when he is not so, has made a disseysine and others have claimed a right of common, and so they compound amongst themselves, that he, who claims a right of common, may place a part under grain with the disseysor, and the party disseysed recovers over against him who holds himself out to be the lord, he recovers over against those who have entered through the disseysor for a term, or until as aforesaid with the grain crop, although they are not nominated in the writ: and this I say for this reason, because they have not a free tenement, except

tum non habent, nisi tantū terminum, vel donec, & sic transit investitura cum tenemento. Sec⁹ esset si disseysitor aliis rem disseysitam daret, ad vitam vel in feodo. Donec quandoq; habet & signat tempus incertum, ut hic s., Concedo tali talem terram vel quid tale, donec ei providero in tantum vel tam bona, vel donec sic vel sic. Si autem dicat sic, donec inde ꝑceperis tot vesturas,[1] vel donec ita sit vel nō sit, vel quandiu excoli possit, hoc non erit liberū teñtum, quia conceditur ad certī tempus & certī terminū. Si autē sic dixerit, Do & cōcedo tibi tantam terrā, donec inde ꝑceperis xl. ł., quia nescitur quanto tempore levari possunt tot libræ de tanta terra, quia termin⁹ incertus est & indeterminat⁹, videtur q teñtum remaneat liberum tenementū, donec tot libræ leventur, cùm sciri non possit nec determinari ꝑ quātum tēpus levari possunt nec ꝑ quot annos, sicut suprà dicitur de tot investuris,[2] & hic determinari potest certus termin⁹, quia quælibet investura[3] habet suū annū & unum.[4] Contingit quādoq;[5] q cùm ꝑ disseysinā aliquando res ad aliū trāslata fuerit vel non translata, disseysitū mori, vel disseysitorē vel utrūq;, vel illū ad quē res translata fuerit vel utrūq; ipsoř, vel aliquē vel ōnes, vel āte impetraī brevis vel post, & si ante, tunc fortè cùm disseysit⁹ sibi cōmodè perquirere posset si vellet, & non perquisivit, vel cùm vellet non potuit infirmitate præpeditus, vel morte præventus, vel alio justo & legitimo interveniente impedimento, vel post impetrationem & diligentem ꝑsecutionem, ita q visus terræ fact⁹ fuit, & juratores electi. In quibus casibus omnibus subvenitur disseysito ꝑ bře de ingressu, secun-

[1] "investituras," MS. Rawl. C. 160.

[2] "investituris," *id.*

[3] "investitura," *id.*

[4] "suum annum et terminum," MS. Rawl. C. 159.

[5] "Contingit quandoque" down to "utendi fruendi," omitted MS. Rawl. C. 159.

such a term or until, and so the investiture passes over with the tenement. It would be otherwise, if the disseysor should give to others the property disseysed for life or in fee. "Until" sometimes has and marks an uncertain time, as here, to wit, I grant to such an one such a land, or something of the like, until I shall have provided for him to such an extent or so well, or until so or so. But if he should say so, Until you shall have derived therefrom so many vestures, or until it be so or not so, or for as long as it can be cultivated, this will not be a free tenement, because it is granted for a certain time and a certain term. But if he shall say thus, I give and grant to you so much land, until you shall have derived therefrom 40*l.* sterling, since it is unknown in how much time so many pounds can be raised from so much land, because the term is uncertain and undetermined, it seems that the tenement remains a free tenement, until so many pounds are raised, since it cannot be known nor determined within how long a time they can be raised, nor within how many years, as has been said above concerning so many investures, and here a certain term may be determined, because each investure has its own year and term. It happens sometimes that when by a disseysine a thing has sometimes been transferred to another, or not transferred, the disseysed party has happened to die, or the disseysor or both, or he to whom the thing has been transferred or both of them, either some or all, either before the suing out of the writ or after, and if before, then perhaps when the party disseysed could conveniently purchase for himself if he wished, and he has not purchased, or when he wished could, not being impeded by an infirmity or anticipated by death, or by the intervention of some just and legitimate impediment, or after the writ has been obtained and diligently prosecuted, so that a view of the land has been taken and the jurors elected. In all of which cases the party disseysed is aided by a writ of

dùm formas inferiùs notandas, tam super possessionibus rerum corporalium, quàm super juribus, s. rebus incorporalibus, sicut super jure pascendi & hujusmodi, utendi fruendi.

f. 177.

Cap. XV.

1. Si res disseysita ad alium transfera tur post disseysinam per disseysitorem unum vel plures. Britton, l. ii. ch. xxii. § 7.

Contingit etiā multotiens, q̄ ille qui facit disseysinā rem disseysitā trāsfert ad alium, ex aliqua causa justa acquisitionis, & cùm disseysit^{9} super eum portet assisam novæ diss. ipse timens assisam, suum spoliat feoffatum, & ita q̄ suus feoffatus sup̄ eum portet assisam, & ita q̄ duæ disseysinæ in unam & eandē concurrant p̄sonā, & sup̄ eundē disseysitorē uterq̄ istorū disseysitoř petit restitutionem p̄ assisam, utriq̄ cōpetit assisa, refert tamen cui primò fieri debeat restitutio. Et sciend̄ est q̄ semper primò cognoscendum est de ultima disseysina, & posteà de prima, ut infrà apparebit p̄ exemplū. Sed esto q̄ prim^{9} disseysitor, cùm feoffatum suum disseysiverit, rem disseysitam restituerit vero dño primo disseysito post disseysinā [1] antequā breve impetraverit sup̄ ipsum, & post longum intervall̄ vel incontinenti, oportet eum qui ultimò disseysit^{9} est p̄ suum feoffatorē, super utrunq̄ [2] portare assisam. Et tunc cùm super utrunq̄ [2] recuperaverit, ita evanescit prima disseysina, & primò disseysit^{9} seysinā suam nō recuperabit, nisi p̄ breve de ingressu, videtur q̄ esset iniquum, cùm uterq̄ superstes sit, disseysitor & primus disseysitus. Temperandum est igitur negotium ex officio judicis, q̄ quicquid agatur remaneat seysina cum primo spoliato sive disseysito, & facta inquisitione de secunda seysina, & inquisita veritate p̄

[1] "post disseysinam," omitted MS. Rawl. C. 160.

[2] "utrumque," *id.*

entry according to forms to be noted below as well as regards the possession of corporeal things, as upon rights, to wit, incorporeal things, as for instance of pasture and such like, of using and taking the crops.

Chapter XV.

f. 177.

1. If the thing disseysed be transferred after the disseysine by one or more disseysors.

It happens also many times, that he who makes a disseysine transfers the thing disseysed to another from some just cause of acquisition, and when the party disseysed brings against him an assise of novel disseysine, fearing the assise, he despoils his own feoffee and so that his own feoffee brings an assise against him, and so that two disseysines concur against one and the same person, and against the same disseysor each of the parties disseysed seeks restitution by assise, each is entitled to an assise, it is of importance however to whom restitution ought first to be made. And it is to be known, that cognisance is always to be first held of the last disseysine, and afterwards of the first, as will appear below by an example. But let it be that the first disseysor when he has disseysed his feoffee, has restored the thing disseysed to its true lord the first party disseysed after the disseysine before he has sued out a writ against him, and after a long interval or forthwith, it is requisite for him who has been last disseysed by his feoffor, to bring an assise against both. And then when he has recovered against both, the first disseysine thus vanishes, and the party first disseysed shall not recover his seysine, except by a writ of entry, it seems that it would be inequitable, since each survives, the disseysor and the first party disseysed. This business is therefore to be tempered through the office of the judge, that whatever be done, the seysine should remain with the first party despoiled or disseysed, and an inquest having heen held concerning the second seysine, and the truth having been inquired into by a jury, if it shall be established

juratam, si constiterit feoffatum per suum feoffatorem esse spoliatum[1] contra factum suum, faciat ei excambiū ad valentiam, quia si per judicium recuperaret feoffatus, & secundo spoliatus contra verum dominum, si verus dominus peteret p assisam versus suū disseysitorē tantùm, vel versus utrunque, obstaret ei exceptio rei judicatæ proposita à feoffato possidente, & sic nunquam recuperaret p assisam: quod esset iniquum, nisi ita esset, quòd sua negligentia ei esse deberet damnosa. Et si contigerit, quòd tenementum cum feoffato remaneret, contra dñm pprietatis, ita sequeretur quòd primò disseysit[2] excambium haberet rei suæ, quā de jure habere deberet in dominico, quod similiter esset iniquum, & cujuscunq; præcedat assisa vel subsequatur, semper locum habebit judicis officium, ut æquum separetur ab iniquo, & quod quidem latissimum est, & q ita fieri debeat p consilium curiæ sive p judicis officium, quod idem est, q remanere debeat seysina rei disseysitæ cum vero dño, & non cum feoffato p disseysitorem, Et q excambium fieri debet feoffato, inveniri poterit in itiñ W. de Ralegh, in coñ Miđ de termino S. T. anno regni regis H. decimo tertio, assisa novæ disseysinæ si Johannes Calbus injustè disseysivit Emmam Duredēt. Casus talis est, et unde judicium positum fuit coram rege & consilio suo. A. dedit B. servitium C., qui de eo tenuit liberè. Item B. occasione doni, quod ei factum fuit per prædictum A. de servitio ipsius C., disseysivit ipsum C. de tenemento quod idem C. tenuit in dominico, & de quo idem B. occasione illius doni nihil clamare potuit nisi tantùm servitium, & postquam idem B. tenementum illud tenuerat in

[1] "disseysitum," MS. Rawl. C. 160.

that the feoffee has been despoiled by his own feoffor in contradiction to his own act, let him make him compensation to the value of it, because if the feoffee should recover by a judgment and the party despoiled in the second place against the true lord, if the true lord should claim by an assise against his disseysor only or against both, there would be in his way an exception of a judgment in the case proposed by the feoffee in possession, and so he would never recover by an assise, which would be inequitable, unless it should be that his negligence ought to be damaging to him. And if it has happened, that the tenement has remained with the feoffee against the lord of the property, it would so follow that the party first disseysed would have compensation for his own property, which he ought to have of right in demesne, which would be in like manner inequitable, and whichever party's assise precedes or follows, the office of the judge will always have place, that what is equitable be separated from what is inequitable, and what is the broadest, and that it should be so done by the counsel of the court or by the office of the judge, which is the same, that the seysine of the thing disseysed should remain with the true lord, and not with the feoffee of the disseysor. And that compensation should be made to the feoffee may be found in the iter of William de Ralegh in the county of Middlesex, in Holy Trinity term in the thirteenth year of the reign of king Henry, in an assise of novel disseysine, if John Calbus had unjustly disseysed Emma Duredent. The case is such, and whereon judgment was raised in the presence of the king and his council. A. gave to B. the service of C., who held of him freely. Likewise B. on the occasion of the donation, which was made to him by the aforesaid A. of the service of C., disseysed C. of the tenement which the said C. held in demesene, and from which the said B. on occasion of the said gift could claim nothing except the service only, and after the said B. had held that tenement in

manu sua per aliquod tempus, illud dedit cuidam D.
f. 177 b. post impetrationem brevis, quod idem C. impetravit super prædictum B., qui ipsum de eodem teñto disseysivit. Et processu temporis, venit idem B. timens assisam q̃ prædictus C. super eum arramavit, & disseysivit ipsum D. de p̃dicto teñto, & illud restituit ipsi C.; posteà venit idem D. qui ultimò fuit disseysitus, & arramavit assisam novæ diss. super utrunque. Sed si D. recuperet p̃ assisam, qualiter consuletur C. vero domino cujus fuit teñtum ab initio? & qui primò injustè fuit disseysitus: quia si D. recuperet per assisam, & C. agat de prima disseysina versus B. suum disseysitorem, vel versus utrunq̃, tam B. quàm D., ex parte D. obstabit ei exceptio rei judicatæ, & ita vix impetrabit excambium, nisi rem propriam habere deberet in dominico. Provisum fuit corā ipso rege, q̃ antequam prædictus D. ultimò feoffatus & disseysitus recuperaret p̃ assisam, q̃ B. warrantizaret prædicto D. & sine alio brevi p̃ officium judicis & de consilio curiæ donum & factum suum, quod ei fecit de prædicto tenemento, & ita q̃ idem D. haberet excambium ad valentiā de teñto ipsius B., & q̃ C. teneret in pace teñtum suum. Item retento primo casu, si cū B. disseysiverit D. & retinuerit teñtum in manu sua, & illud non restituerit ipsi C. observabitur ordo ut supradictum est, cùm uterq̃ tam D. quàm C. portaverit assisam super ipsum B., videlicet q̃ C. primò recuperabit versus B. & B. faciet excambium ipsi D.; sed cùm C. tantùm sine D. & per assisam recuperaverit versus B., & D. tunc demùm assisam portet super ipsum B., non audietur sine ipso C. & quamvis B.

his hand for some time, he gave it to a certain D. after the suing out of a writ, which the said C. sued out f. 177 b. against the aforesaid B. who disseysed him from the same tenement. And in process of time the said B. came, fearing an assise which the aforesaid C. instituted against him, and disseysed the said D. from the aforesaid tenement, and restored it to the said C.; afterwards came the said D., who was disseysed in the last place, and instituted an assise of novel disseysine against both. But if D. should recover by the assise, in what way will the interest of C. the true lord, who had the tenement from the beginning, be consulted? and who was the first party unjustly disseysed? because if D. should recover by an assise and C. should proceed for the first disseysine against B. his disseysor, or against both as well B. as D., on the part of D. there will be the obstacle of an exception of a judgment given, and so he will scarcely obtain compensation, unless he ought to have his own property in the demesne. It was provided in the presence of the king himself, that, before the aforesaid D. the last feoffee and disseysee should recover by an assise, B. should warrant to the aforesaid D. and without any writ through the office of the judge and by the counsel of the court the donation and his own act, which he did to him concerning the aforesaid tenement, and so that the said D. should have compensation up to the value of the tenement of the said B., and that C. should keep in peace his tenement. Likewise in retaining the first case, if when B. has disseysed D. and retained the tenement in his own hand, and has not restored it to the said C., the same order shall be observed as above said, when both D. as well as C. have brought an assise against the said B., to wit, that C. shall first recover against B. and B. shall make compensation to the said D., but when C. only without D. and by an assise has recovered against B., and D. then at length brings an assise against B., he shall not be heard without the said C., and although B. be

teneatur ad pœnam propter disseysinā & propter injuriam, tamen restituere non potest sine C. Si autem tantùm super ipsum C. ipse non fecit disseysinam ipsi D. sed per judicium recuperavit ut teñtum suum proprium, de quo idem B. ipsum disseysiverat. Oportet igitur de necessitate utrunq; in brevi comprehendere, B. s. quia fecit disseysinā & C. quia rem detinet disseysitā, & in quo casu fiat tēperamentum (ut suprà) q C. retineat teñtum suum & B. faciat D. excambium. Item esto q D. pri⁹ agat per assisam, & recuperet versus B., & tunc velit C. agere versus B. tantū, recuperare non poterit versus B. quia non habet q restituat. Oportet igitur de necessitate utrunq; cōprehendere tam B. q D., sive D. incontinenti feoffatus fuerit post primā disseysinā, sive p̄ intervallum, & quamvis D. habeat p̄ se exceptionē rei judicatæ p̄ assisam, vel q disseysinā non fecerit, ipsi C. tamen (ut suprà) sic tēperabitur negotium, q C. suum recuperabit teñtum & q B. ipsi D. faciat ad excambium, & ita fiet si teñtum ad plures manus devenerit post disseysinam, q primus disseysit⁹ suum recuperabit tenementum, & ultimò feoffatus p̄ disseysitorem, & sine judicio disseysitus recuperabit excambium. Et sive p̄sens fuerit principalis disseysitor sive absens, vocet eum tenens qui disseysinam non fecit ad warrantum sine alio brevi, & ei warrantizabit, q non erit, si post br̄e impetratum translatū fuerit teñtum ad alium, quia talis amitteret, nisi sibi p̄spexerit per breve de warrantia chartæ dum fuerit in seysina, quia intravit in seysinam de re, quæ effecta fuit litiḡiosa p̄ diligentē impetrationē & diligentem p̄secu-

liable to a penalty on account of the disseysine and on account of the injury, nevertheless he cannot make restitution without C. But if only against the said C., he has not made a disseysine against the said D., but he has recovered by a judgment his own tenement, of which the said B. had disseysed him. It is incumbent therefore of necessity to comprise both in the writ, B. to wit because he caused the disseysine, and C. because he detained the thing disseysed, and in which case an adjustment is made (as above), that C. shall retain his own tenement and B. make compensation to D. Likewise let it be that D. proceeds first by an assise and recovers against B., and then C. wishes to proceed against B. alone, he cannot recover against B. because he has not any thing to restore. It is incumbent therefore of necessity to comprise as well B. as D., whether D. has been enfeoffed immediately after the first disseysine or after an interval, and although D. may have for himself an exception of a judgment had in the case by an assise, or that he did not make a disseysine against the said C., nevertheless (as above) the business shall be adjusted in this way, that C. shall recover his own tenement, and that B. shall make compensation to D.; and so it shall be, if the tenement has come into several hands after the disseysine, that the first party disseysed shall recover his own tenement, and the last party enfeoffed by the disseysor, and disseysed without a judgment, shall recover compensation. And whether the principal disseysor shall be present or absent, let the tenant, who has not made a disseysine, call him to warrant without another writ, and he shall warrant [the tenement] to him; which shall not be, if after the writ has been sued out the tenement has been transferred to another, for such a party would lose it, unless he had taken care of himself by a writ of warranty of his charter, whilst he was in seysine, because he has entered into seysine of a thing, which was rendered litigious by a writ having been diligently

tionem. Item & de eodem modo, si res ad alium statim & recenter translata fuerit ad alium post disseysinā
f. 178. licèt ante impetrationem, nō habebit talis warrantum si illum vocaverit, quia uterq; disseysitor & tenēs sunt in eadem causa damnationis. Item esto q; A. dimiserit B. terrā ad terminum reddendo sibi inde c. s. per annum, posteà dedit illā terram cuidam C. tenendā in feodo, & facit ei seysinam, salvo firmario termino suo, & attornat servitium firmarii, s. illos centum solidos prædicto C. suo feoffato, & firmarius facit eidē C. servitium prædictum, post venit idem A. cùm nihil habeat nisi nudum dominium, & de facto (cùm de jure non possit) feoffeffat p̄dictum B. firmarium, & post tale feoffamentum non vult firmari[2] solvere redditum, posteà verò prædictus C. primò feoffatus, dejicit ipsum B. firmarium & secundò feoffatum, prædictus verò B. firmarius portat assisam novæ diss. super C. primum feoffatum, non recuperabit seysinam, quia prædictus A. nullum potuit ei facere liberum tenementum, quia nullam omnino habuit seysinā, nec aliud nisi tantùm nudum dominium. De consilio tamen curiæ regis, p̄ officium judicis, fraude detecta, vel p̄ recognitionē in odiū circumvētionis, de terris ipsus A. providebitur ipsi B. excambium ad valentiam, sive primò feoffatus sit liber sive servus, quamvis si servus, nullus prædictorum A. vel B. habebit exceptionem servitutis. Item esto q; A. ejiciat B. & statim post disseysinam feoffeffat[1] C., si hoc fecerit ante impetrationem, oportet utrunq; in brevi comprehendere, quia nullus sine alio respōdere poterit, licèt uterq; sit principalis disseysitor, & quia

[1] "feoffeffet," MS. Rawl. C. 160.

sued out and a prosecution diligently made. Likewise and in the same manner if the thing has been immediately and recently transferred to another after the disseysine although before the suing out of a writ, such a party shall not have a warrantor, if he shall have called him, because both the disseysor and the tenant f. 178. are in the same cause of condemnation. Likewise let it be that A. has demised to B. land for a term on rendering to him a hundred shillings by the year, afterwards he has given that land to a certain C. to be held in fee, and has given him seysine, saving to the farmer his term, and he transfers the service of the farmer, to wit the hundred shillings, to the aforesaid C. his feoffee, and the farmer performs to the said C. his service; afterwards the said A. comes, when he has nothing but the nude dominion, and in fact (for he could not do it in right) enfeoffs the aforesaid B. the farmer, and after such a feoffment the farmer does not choose to pay rent, but afterwards the aforesaid C., the first feoffee, ejects the said B. the farmer and the second feoffee, but the aforesaid B. the farmer brings an assise of novel disseysine against C. the first feoffee, he shall not recover seysine, because the aforesaid A. could not make for him a free tenement, for he had no seysine at all, nor any thing but the nude dominion. But upon a resolution of the court of the king by the office of the judge, the fraud having been detected, or by a recognition, in hatred of circumvention, from the lands of the said A. there shall be provided for the said B. compensation up to the value, whether the first feoffee was a free man or a serf, although if a serf, none of the aforesaid A. or B. shall have an exception of serfage. Likewise let it be that A. ejects B., and immediately after the disseysine enfeoffs C., if he has done this before the suing out of a writ, it is requisite to comprise both in the writ, because neither can answer without the other, although each may be a principal dissey-

primus & principalis restituere non potest sine feoffato, nec feoffatus disseysinam fecit ꝑ se, sed simul cum feoffatore, & sic de pluribus in infinitum. Si autem post impetrationem feoffaverit, sive statim sive post intervallum fiat ut suprà. Item esto q̃ A. ejiciat B. & C. ejiciat A. & sic quilibet alterum, & ulteri⁹ in infinitum, & postmodū A. ejiciat C. vel B. ejiciat C. incontinenti vel post intervallum, videndū erit quis primò impetraverit, & in cujus persona tenementum esse debeat in pace usq̃ adventum justic., & sciendum quòd in manibus illius, qui inventus fuerit seysitus tempore impetrationis ꝑpter verba, q̃ vicecom̃ faciat teñtum esse in pace usq̃ ad adventum justic. Item esto, q̃ B. sine judicio disseysivit A. post intervallum, & antequā B. transtulerit rem ad alium si A. impetraverit super B., licèt disseysitor fuerit, recuperabit: si autem gratis obtulerit disseysito, & disseysitus gratis rem oblatam ceperit ante impetrationē, bene licet, sed post impetrationem non, sine pœna. Item esto q̃ A. primus disseysitor disseysiverit C. suum feoffatum vel suum disseysitorem, & sic restituat tenementum B. antequam C. impetraverit, C. habebit assisam super utrunq̃, si res fuerit restituta ipsi B. ante impetrationē C., si autē post, sufficit si impetratum sit tantū super ipsum A. Item esto q̃ A. cùm disseysiverit C. tenuerit teñtum in manu sua, & cum C. impetraverit sup A. & A. post impetrationē restituerit B., C. recuperabit versus utrunq̃, & ita q̃ B. nunquam postmodum audietur nisi super ꝑprietate, quia rem licèt propriam,

sor, and because the first and principal cannot make restitution without the feoffee, nor has the feoffee made the disseysine by himself, but together with the feoffor, and so from several to an infinite number. But if he has enfeoffed him after suing out the writ, whether forthwith or after an interval, let it be done as above. Likewise let it be that A. ejects B. and C. ejects A. and each the other, and further on to infinity, and afterwards A. ejects C. or B. ejects A. forthwith or after an interval, we must see who has first sued out a writ, and in whose person the tenement ought to be in peace until the arrival of the justices, and it is to be known that it shall remain in the hands of him who was found seysed of it at the time of the suing out of the writ, on account of the words wherewith the viscount makes the tenement to be in peace until the arrival of the justices. Likewise let it be that B. without a judgment has disseysed A. after an interval, and before A. has transferred the thing to another, if A. has sued out a writ against B., although he may be the disseysor, he shall recover: but if he has gratuitously offered it to the disseysee, and the disseysee has gratuitously accepted the thing offered before the suing out of a writ, it is well allowable, but after the suing out, not so, without a penalty. Likewise let it be that A., the first disseysor, has disseysed C., his feoffee or his disseysor, and has so restored the tenement to B. before C. has sued out a writ, C. shall have an assise against both, if the thing has been restored to the said B. before C. has sued out the writ, but if afterwards, it is sufficient if it be sued out only against the said A. Likewise let it be that A. when he has disseysed C. has kept the tenement in his own hand, and when C. has sued out a writ against A., and after the suing out of the writ has restored the thing to B., C. shall recover against both, and so that B. shall never be heard afterwards except upon the property, because he received the thing, although it was his

tamen contentiosam recepit, & in præjudicium C. cùm injustè inde fuerit disseysitus, & in quo casu non licuit ei rem propriam sine judicio recipere. Item esto quòd tam B. quàm C. impetraverint super ipsum A. simul, quæro cujus assisa præcedere debeat? & secundùm
f. 178 b. quod ad ultimam assisam erit recurrendum. Item esto q̃ C. ultimò disseysit[9] negligens sit & B. prius sibi impetraverit super ipsum A. & p̃ assisam recuperaverit versus ipsum A., & C. postmodū impetraverit super utrunq; s. A. & B., ex parte B. obstabit ei exceptio rei judicatæ, ex parte verò A. tenebit breve quoad excābium p̃ officium judicis. Si autem impetraverit tantùm super B. non valebit, quia nullam fecit disseysinam: & si tantùm super A. restituere non potest, & ideò super utrunq;. Ex præmissis igitur videtur & præsumitur, q̃ in assisa novæ diss. vocari possit warrantus, quod videtur absurdum esse, cùm in delictis non possit quis warrantum vocare, nec dominum sive autorem nominare, & cùm pœna suos tenere debeat autores, ad q̃ distinguendum, utrum intentetur querela novæ disseysinæ versus aliquem, secundùm quod pœnalis est, vel rei persecutoria tantū. Si autem secundùm quod pœnalis est, sive contra unum, sive contra plures qui principaliter fecerint disseysinam, vel feoffati fuerint recenter post disseysinam, intentetur: nunquam erit warrantus vocandus p̃pter delictum disseysinæ. Si autem intentetur versus aliquem, in eo quod est rei persecutoria tantū: ut si aliquis feoffatus fuerit per disseysitorem p̃ longum intervallum post disseysinam, & ante brevis impetrationem, cùm talis non teneatur ad pœnam, eò quòd disseysinam nō fecit,

own, when it was the subject of a lawsuit and in prejudice of C., since he was unjustly disseysed of it, and in which case it was not allowable for him to receive back his own property without a judgment. Likewise let it be that B. as well as C. has sued out a writ against the said A. simultaneously, I ask whose assise ought to take precedence, and according to what shall recourse be had to the last assise? Likewise let it be that C., who was f. 178 b.
last disseysed, is negligent, and B. has first sued out a writ for himself against the said A., and has recovered against the said A., and C. has afterwards sued out a writ against both, to wit, A. and B.; on the part of B. there will be in his way the exception of a judgment obtained, but on the part of B. a writ for compensation through the office of the judge will hold good. But if he has sued out a writ only against B. it will not be valid, because he has made no disseysine, and if only against A. he cannot make restitution, and accordingly against both. From the premises, therefore, it seems and it is presumed that in an assise of novel disseysine a warrantor may be called, which seems to be absurd, since in offences a person cannot call a warrantor, nor name a lord or author, and since a penalty ought to bind his authors, in regard to which we must distinguish whether a complaint of novel disseysine is brought against any one, according as it is penal, or only for the sake of pursuing the thing. But if according as it is penal, whether it be brought against one or against several who have principally caused the disseysine, or have been recently enfeoffed after the disseysine, a warrantor will never have to be called on account of the offence of the disseysine. But if it be brought against any one, in so far as it is only in pursuit of the thing, as if some one has been enfeoffed by a disseysor after a long interval since the disseysine, and before the suing out of a writ, since such a person is not liable to a penalty, inasmuch as he has made no disseysine, although he is

licèt teneatur ad rei restitutionem, warrantum vocare poterit de jure, & etiam sine alio brevi, si p̃sens fuerit, s. suum feoffatorem, & statim respondere debet warrantus, etiam sine alio brevi, si autem p̃sens non fuerit in captione assisæ tunc cùm vocatus fuerit, statim summoneatur quòd sit ad warrantizandum tenementum, de quo vocatus fuit ad warrantum, dum tamen tenens fuit in seysina, ad similitudinem ejus q̃ fit in assisa mortis antecessoris. Si autem uterq̃ absens fuerit, hoc sibi poterit feoffatus imputare. Et idē esse poterit, si vocetur warrantus p̃ br̃e de ingressu post disseysinam, ubi un⁹ illorum moritur vel tenens vel querens, vel uterq̃, & ibi extinguitur pœna cum persona, ut si querens tantùm, nisi sit qui agere possit de injuria, cùm ille mortuus sit cui fuit injuriatum, qui habuit actionem quoad pœnam. Itē nec si tenens, quia cùm pœnalis sit non datur in hæredes, non magis quàm hæredibus datur sicut in præmisso casu. Nec ergo si uterq̃ moriatur, multo forti⁹. Item q̃ warrantus vocari possit, patet manifestè, ut si assisa novæ disseysinæ contra aliquem fuerit aramata, qui p̃ judicium curiæ suæ recuperaverit, si curiam suam vocaverit ad warrantum, audiri debet, & veniat recordum, quia si curia malè judicaverit, tenebitur curia ad pœnā & ipse nō, quamvis teneatur ad restitutionem. Sed objici poterit, nonne tenetur dñs ad pœnam, cùm curia malè judicaverit? & ipse post judicium statim ingressus est tenementum, & ideò disseysitor cum curia? sicut alius qui ingreditur statim post disseysinam per ipsum disseysitorem & de voluntate sua, vel contra voluntatem suam per disseysinam per ipsum disseysitorem? Cum autem

liable to make restitution of a thing, he may call a warrantor concerning his right, and even without another writ, if he should be present, to wit, his feoffor, and the warrantor ought to answer forthwith, even without another writ, but if he be not present at the holding of the assise, then when he has been called, let him be summoned that he be present to warrant the tenement, concerning which he has been called as a warrantor, provided, however, the tenant be in seysine of it, after the likeness of what is done in an assise of the death of an ancestor. But if both be absent, the feoffee must impute it to himself. And the same may be, if a warrantor be called by a writ of entry after a disseysine, where one of them dies, either the tenant or the complainant, or both, and there the penalty is extinguished with the person, as if the complainant only [dies], unless there be one who may proceed for an injury, when he is dead to whom the injury was done, who had a right of action as regards the penalty. Likewise neither if the tenant [dies], because since it is a penal action it is not allowed against the heirs, no more than it is allowed to the heirs as in the case premised. Nor therefore if both die, much more. Likewise that a warrantor may be called is manifestly clear, as if an assise of novel disseysine is instituted against any one, who has recovered by a judgment of his court, if he has called his court to warrant, he ought to be heard and the record should come; because if the court has decided ill, the court will be liable to the penalty, and not himself, although he may be bound to make restitution. But it may be objected, is not the lord liable to a penalty when the court has decided ill? and he has himself immediately after the judgment entered on the tenement and is therefore a disseysor with the court? like any one else who enters immediately after the disseysine through the disseysor and with his consent, or against his will through a disseysine by the disseysor himself. But when a

sic feoffatus per longum intervallum warrantum vocet, & ei fuerit per judicium vel alio modo warrantizatum, ꝑ warrantiam illam jam quasi transfertur res disseysita ad personam ejus, & ita quòd ipse qui fecit disseysi-
f. 179. nam restituere poterit rem disseysitam querenti, quod ante warrantiam non potuit, & sic liberabitur omnino feoffat⁹ & disseysitor, & idē feoffator tenebitur ad restitutionē & similiter ad pœnam disseysinæ, & ita ꝑ warrantiā oĩa reducuntur ad tempus disseysinæ factæ. Et videtur ꝙ sic fieri possit in omni casu, ad quēcunq; translata fuerit res post disseysinā, unū vel plures, in ꝑsonis ipsorū & similiter hæredum ipsoꝝ, quādiu ipsæ principales ꝑsonæ duraverint, s. disseysit⁹ & disseysitor qui alienavit, cùm autem unus illoꝝ obierit, extincta est actio in eo ꝙ pœnalis est. Sed cùm disseysitor tenementū ad aliū transtulerit, statim vel post intervallum viventib⁹ disseysitore & disseysito, quæritur an disseysit⁹ petere possit teñtum, versus tenentē ꝑ brẽ de ingressu, vivente disseysitore, sicut posset si mortuus esset, & petere restitutionē & remittere pœnā disseysinæ disseysitori, sicut posset ille qui habet actionem criminalem versus aliquem, & in volunt̃ ipsius erit, utrū velit ab initio criminaliter agere vel civiliter: non, quia si warrantus vocetur (ut p̃dictum est) sic posset esse actio pœnalis licèt civiliter intētata, quæ quidē ꝑ tale breve terminari non possit.

Cap. XVI.

1. Audita querela rex mittat breve suum vicecomiti. De modo impetra-

Audita à superiore, ad quem pertinet vim & injuriam ꝑpulsare, & ad quem recurritur de necessitate, querela transmittet breve suum vic., in quo contine-

person so enfeoffed after a long interval calls a warrantor, and he has obtained a warranty by a judgment or in any other manner, by that warranty the thing disseysed has been as it were transferred to his person, and so that he who made the disseysine may restore the thing disseysed to the claimant, which he could not have done before the warranty, and so the feoffee and the disseysor will both be set free altogether, and the said feoffor will be liable to make restitution and in like manner to the penalty of the disseysine, and so by the warranty all things are brought back to the time of making the disseysine. And it seems that this may be done in every case, to whomsoever the thing may have been transferred after the disseysine, one or several persons, in their own persons or in like manner in the persons of their heirs, as long as the principal persons have lasted, to wit, the disseysee and the disseysor who alienated it; but when one of these is dead, the action in respect of its being penal is extinguished. But when the disseysor has transferred the tenement to another, forthwith or after an interval, whilst the disseysor and disseysee are alive, it is asked whether the disseysee can claim the tenement against the tenant by a writ of entry, whilst the disseysor is alive, as he could if he were dead, and claim restitution and remit the penalty of the disseysine to the disseysor, as he who has a criminal action against any one may, and it will be in his discretion whether he will from the beginning proceed criminally or civilly: not so, because if a warrantor be called (as afore-stated) it might then be a penal action, although brought civilly, which cannot be terminated by such a writ. f. 179.

Chapter XVI.

1. Having heard the complaint, the king sends his

Upon the complaint having been heard by a superior, to whom it pertains to ward off violence and injury, and to whom recourse is had of necessity, he shall transmit

tionis brevis novæ disseysinæ. Britton, l. ii. ch. xiv. § 1.

bitur tam nomen querentis, quàm ejus de quo queritur, sive sit unus vel plures, & forma querelæ, secundùm quod ei facta fuerit qui jura tuetur, in hæc verba.

2. Forma brevis de nova disseysina. Glanville, l. 13. ch. 32 & 33.

Rex vic. salutem. Questus est nobis talis, q talis injustè & sine judicio disseysivit eum de libero tenemēto suo in tali villa post ultimum redditum dñi regis de Brittannia in Angliam.[1] Et ideò tibi p̃cipimus, quòd si prædictus talis fecerit te securum de clamore suo p̣sequendo, tunc facias tenementum illud reseysiri de catallis quæ in ipso capta fuerint, & ipsum tenementum cum catallis esse in pace, usq̣ ad primam assisam, cū justitiarii nostri ad partes illas venerint. Et interim facias duodecem liberos & legales homines de visneto illo videre tenementum illud, & nomina illorum imbreviari. Et summoneas eos per bonos summonitores, quòd sint ad primam assisam coram præfatis justitiariis nostris, parati inde facere recognitionem, & pone per vadium & salvos plegios prædictum talem vel ballivum suum, si ipse inventus non fuerit, quòd tunc sit ibi auditurus recognitionem illam, & habeas ibi summonitorum nomina, plegios, & hoc breve. Teste &c. Facta autem taliter impetratione, secundùm quod prædictum est, statim & sine mora tradatur breve vic., ne per negligentiam, & min[9] diligentem p̣secutionem, efficiatur res non litigiosa, quæ ab initio litigiosa facta fuit per diligentem impetrationem.

3. De officio vicecomitis cum acceperit breve. f. 179 b.

Officium verò vic. est, cùm breve receperit, in principio plegios de prosequendo recipere à querente, sive unus fuerit querens sive plures, nisi in curia dñi regis

[1] "in Angliam." This is the original form of the writ as issued after king Henry the second's return from Brittany, A.D. 1184.

his writ to the viscount, in which shall be contained the name of the complainant as well as of him concerning whom the complaint is made, whether it be one or more, and the form of the complaint according as it has been made to him who protects rights, in these words.

writ to the viscount. Of the manner of suing out a writ of novel disseysine.

The king to the viscount greeting. So-and-so has complained to us that such a person has unjustly and without a judgment disseysed him from his free tenement in such a vill after the last return of the king from Britanny into England, and accordingly we enjoin you that, if the aforesaid so-and-so has given you security for following up his complaint, you thereupon cause that tenement to be reseysed of the chattels which were taken in it, and the tenement itself with the chattels to be in peace until the first assise; when our justices shall have come to those parts. And meanwhile cause twelve free and loyal men of that vicinage to view that tenement, and their names to be entered on the writ. And summon them by good summoners, that they be at the first assise before our aforesaid justices, prepared thereupon to make a recognition, and place under bail and safe sureties the aforesaid so-and-so or his bailiff, if he himself has not been found, that they shall then be there in order to hear that recognition, and have there the names of the parties summoned, the sureties, and this writ. Witness, &c. But after such a writ has been sued out, according to what has been said above, let the writ be forthwith and without delay delivered to the viscount, lest by negligence or undiligent prosecution the thing be rendered not litigious, which had been rendered ligitious by a diligent suit of the writ.

2. The form of a writ of novel disseysine.

It is the office of the viscount, when he has received the writ in the commencement, to receive from the complainant securities for the prosecution, whether there be one complainant or many, unless he has found sureties by

3. Of the office of the viscount, when he has received the writ. f. 179 b.

fortè plegios invenerit, vel fidē dederit ꝑ paupertate, secundùm quod in brevi continebitur. Ab uno autem recipiat duos plegios ad min^{o}, qui sufficientes sunt ad misericordiam dñi regis solvendam, si querens fortè se retraxerit, vel nō fuerit ꝑsecut^{o}, & tales etiam recipiat qui sufficiant ad misericordiā, ita q̄ nō oporteat seipsum ꝑ aliis de misericordia respondere. Si autem vir & uxor sint querentes, sufficit, si illi duo duos plegios sufficientes inveniant, ꝑpter unicum jus quod habent, & quia sunt una caro quamvis diversæ animæ, & una erit misericordia, sive unus eorum vel ambo re retrahant vel non sequantur, & quia defalta unius ipsorum in personam utriusq̄ redundabit. Item erit (ut videtur) de pluribus unam disseysinam & injuriam ꝑsequentibus in communi, cùm sint quasi unum corpus, & ideò unica sufficit securitas ꝑ duos plegios, secundùm quosdam, quia si onere satisdationum gravarentur, ita cogerentur à prosecutione sui juris desistere. Tutius tamen est (secundùm alios) quòd quilibet eorum duos plegios inveniat, si possit. Item ad officium ejus pertinet, quòd faciat tenementum reseysiri de catallis, &c., quod hodie aliter observatur, quia querens omnia damna post captionem assisæ recuperabit, per sacramentum recognitorum declaranda, ut inferiùs dicetur. Itē q̄ teñtum faciat esse in pace, videlicet q̄ non permittat disseysitorem rem disseysitam ad alium transferre, vel querentem sine judicio seysinam sibi usurpare, usq̄ ad primam assisam &c. Et unde si quis rem ita effectam litigiosam per impetrationem, aliquo modo, vel per disseys. vel ex aliqua causa acquisitionis ingressus fuerit, illā sine brevi restituet vero dño, sine

chance in the court of the lord the king, or has given his promise by reason of poverty, according as shall be contained in the writ. But let him receive from one two sureties at least, who are sufficient to pay the amerciment of the lord the king, if the complainant has by chance withdrawn himself or has not prosecuted, and let him receive such as may be sufficient for the amerciment, so that it shall not be necessary for himself to answer for others concerning the amerciment. But if husband and wife are the complainants it is sufficient for these two to find two sufficient sureties, on account of the single right which they have, and because they are one flesh, although different souls, and there shall be one amerciment, whether one of them or both withdraw themselves, or do not pursue, and because the default of one of them redounds on the person of both. It will be the same (as it seems) concerning several persons pursuing in common one disseysine and injury, since they are as it were one body, and therefore one security by two sureties suffices according to some, because if they were overweighted by the burden of giving security, they would be compelled to desist from the prosecution of their right. It is safer, however (according to others), that each should find two sureties if he can. Likewise it pertains to his office, that he cause the tenement to be reseysed of the chattels, &c., which in the present day is otherwised observed, because the complainant will recover all the losses after the holding of the assise, to be declared by the oath of recognisors, as will be explained below. Likewise that he will cause that tenement to remain in peace, to wit, that he will not allow the disseysor to transfer the thing disseysed to another, or the complainant without a judgment to usurp to himself seysine up to the next assise, &c. And hence if a person has entered upon a thing so rendered litigious by the suing out of a writ, in any way, or by a disseysine, or from any cause of acquisition, he shall restore it with-

regressu habendo versus suum feoffatorem, nisi sibi ꝑspexerit ꝑ breve de warrantia dum fuerit in seysina. Item q in eodem statu remaneat, quòd injuria non crescat, nec res deterioretur vel vastetur, quamvis eam meliorare liceat. Item quòd blada nondum matura non amoveantur, quamvis possit matura amovere ille qui possidet, & alius damna consequatur si optinuerit.

4. De visu faciendo.

Item ad ipsum pertinet, quòd in præsentia partium (si velint interesse) eligere faciat & cōvenire duodecem liberos & legales homines de visneto illo ut in adventu justitiariorum facere possunt recognitionem, quos etiam statim mittat ad videndum teñtum illud, & nomina eorum faciat imbreviari, & non solum ab uno vel à duobus, sed etiam ab omnib⁹ si fieri posset, vel etiam septem ad min⁹, quia per pauciores assisa capi non poterit, licèt possit per plures quàm duodecem ex aliqua justa causa. Necesse est enim quòd fiat visus de tenemēto à juratoribus, ut certa res deduci possit in judicium, & q juratores verum & certum facere possunt sacramētum, & q ꝑinde possit justitiari⁹ justum ꝑferre judicium.

5. De quibus rebus, et qualiter fieri debet visus. Britton, l. ii. ch. xiv. § 4. Fleta, 222.

Videre autē debent juratores quale sit tenementū, & quid, & quantū, quale videlicet, utrū terra vel redditus, & utrum res sacra vel prophana. Item privatum vel commune, ut infrà. Item quantum querens posuerit in viso suo, quia si querens posuerit in visu suo plus quàm illud de quo fuerit disseysitus, cadit in misericordiam pro superdemanda, si autem minus, non. Et eodem modo in assisa mortis

f. 180.

antecessoris observetur, ut de itinere abbatis de Rading & M. de Pateshul anno regis H. quinto in coñ Warr̃, assisa novæ diss. si W. de Ludingtō. Quid ? s. utrum

out a writ to the true lord, without having recourse against his feoffor, unless he has provided for himself by a writ of warranty whilst he was in seysine. Likewise that it shall remain in the same state, that the thing shall not increase by any injury, nor be deteriorated nor wasted, although it be allowable to improve it. Likewise that corn not ripe shall not be removed, although he who possesses it may remove it if it is ripe, and the other shall obtain damages if he shall prevail.

4. Of making a view.

Likewise it pertains to him that in the presence of parties (if they wish to take part) he cause to be chosen and convened twelve free and loyal men of that visne, that on the coming of the justices they may make a recognition, whom he should forthwith send to view the tenement, and let him cause their names to be entered on the writ, and not only by one or by two, but also by all if it be possible, or even seven at least, because an assise cannot be taken by fewer, although it may by more from a just cause. For it is necessary that a view of the tenement should be made by the jurors, that a thing ascertained may be brought into judgment, and that the jurors may make a sure oath, and that the justice may equally make a just judgment.

5. Of what things and how the view ought to be made.

But the jurors ought to see the tenement, of what kind it is, and what it is and how much; of what kind, for instance, whether land or rents, whether a thing sacred or profane. Likewise private or common, as below. Likewise how much the complainant has put into his view, because if the complainant has put into his view more than that of which he has been disseysed, he is at the mercy of the court for his excess of claim, but if less, not so. And in the same way let it be observed in an assise of the death of an ancestor, as in the iter of the abbot of Reading and Martin de Pateshull in the fifth year of king Henry, in the county of Warwick, in an assise of novel disseysine, if William of Ludington. f. 180.

terra & teñtū illud de quo facta fuerit disseysina, sive reddit⁹ sive consistat in solido vel in liquido. Et tunc videre debet teñtū de quo redditus ꝑvenerit, sive consistat in denariis sive in aliis rebus quibuscunq; numero, pondere, vel mensura. Mensura, solida vel liquida, solida, sicut in frumento, liquida, sicut in vino, oleo, & hm̃i. Itē quantū, s. utrū plus vel minus. Item videre debent in quo teñtum sit, & in qua villa, & in quo loco, & in qua parte loci, & int̃ quos fines & quos terminos teñtum cōtineatur, ut si de numero acrarum vel virgatarū dubitetur, ut ad minus, si quantitatem rei distinguere non possunt, q̃ dicere possunt certum vel circiter, vel saltē infra quas metas teñtum contineatur. Itē si de loco constiterit, nesciunt tamen qua parte loci, cùm ad seysinā faciendam, sufficit si in quacunq; parte loci fiat seysina, & si in qua parte constiterit, sed tamen nesciant determinare fines teñti, tamen sufficit si fiat seysina ad quantitatē dicti juratorum ꝑ rationabilem mensurā. Item si de com̃ constare non possit, cadit assisa novæ disseysinæ in ꝑambulationem per illud idem breve de nova diss. Si autem redditus, tunc fiat juratoribus visus de tenemento, unde redditus ꝑvenit. Item si cōmunia pasturæ, tunc fiat visus de teñto in quo petitur cōmunia, & similiter de teñto ad quod dicitur ptinere.

6. Si de redditu provenienti de camera.

Si autē redditus fieri debeat de camera imperpetuū vel ad tempus, non potest fieri visus de aliquo teñto. Et ideò assisa locū non habet, cùm hm̃i redditus non sit teñtum, sed alia actione opus erit, & hoc sive red-

What? to wit, whether it was land and a tenement of which a disseysine had been made, or rent, or whether it consisted of liquid or solid. And then [the jury] ought to see the tenement from which the rent has accrued, whether it consists of coin or any other things [which admit] of number, weight, or measure. Of measure, solid or liquid, solid as in the case of wheat, liquid as in the case of wine, oil, and such like. Likewise how much, to wit, more or less [than the quantity claimed]. Likewise they ought to see in what the tenement is, and in what vill, and in what place, and in what part of the place, and between what boundaries and what limits the tenement is contained, that if there be a doubt about the number of acres or of rods, that at least, if they cannot distinguish the quantity of the thing, they may say a certain quantity or thereabout, or at least within what metes the tenement is contained. Likewise if the place is ascertained, they are, however, ignorant in what part of the place, when they have to make a seysine, it is sufficient if the seysine be made in any part of the place; and if it be ascertained in what part of the place, but they know not how to determine the boundaries of the tenement, nevertheless it is sufficient if a seysine be made of the quantity declared by the jury by a reasonable measurement. But if it cannot be ascertained concerning the county, the assise of novel disseysine falls into a perambulation by the very same writ of novel disseysine. But if rent, then let the jurors have a view of the tenement whence the rent proceeds. Likewise if common of pasture, then let a view be had of the tenement in which a right of common is claimed, and in a similar way of the tenement to which it is said to pertain.

6. If of rent coming from a chamber.

But if the rent ought to proceed from a chamber in perpetuity or for a time, a view cannot be held of any tenement. And therefore an assise is not applicable, when this kind of rent is not a tenement, but another kind of action will be necessary, and this whether the

ditus ꝑveniat ex camera tantū, vel ex teñto aliquo, sed non ꝑ manū illi[9] qui tenet teñtum, sed ꝑ manus[1] donatoris, quod idem erit quod de camera. Si autem ꝑ man[9] tenentis fieri debeat solutio & immediatè de certo tenemento, si cessatum fuerit, & cū locum non habeat districtio, locū habebit assisa in defectū districtionis. Et eodem modo, si ex aliquo certo tenemento concedatur reddit[9], plus vel minus, ut si aliquis ex aliquo manerio suo concesserit alicui ꝑ annū & in feodo decem libras cum districtione vel sine. Et si cū districtione, aut est sufficiēs aut non est sufficiens: si autem sufficiens, teneat se ad districtionem ille cui reddit[9] debetur. Si autem omnino nulla vel min[9] sufficiens, locū habebit assisa ꝑpter defectum districtionis, ex quo redditus provenit ex certo teñto, & quia ibi deficit districtio, locum habebit assisa.

7. Si de recordo.[2] Britton, l. ii. ch. xiv. § 5.

Item in visu faciendo, si visus fieri debeat de corrodio, quæro si talis possit facere visum juratoribus de aliquo teñto? etiam, ut videtur prima facie, quia prioratus sive abbatia vel alia domus est quasi tenementū de quo talis redditus provenire debet, unde videtur quòd sufficit si visus fiat de abbatia, sicut de aliis teñtis de quibus redditus provenit, sicut de domo privata, sed revera hm̃i abbatia & prioratus non sunt tenementa alicujus singularis personæ, cū sint sacra & religiosa, & in bonis Dei, & non alicujus hominis privati, vel singularis personæ, & hujusmodi præstatio est quasi p̃statio de camera, & unde nulla districtio, & ideò cùm hujusmodi corodia[3] sint quasi spiritualia, sive spiritualibus annexa, non est recurrendum (si detineatur) ad forū seculare, & quoniā in hujusmodi
f. 180 b. corodiis[4] committi poterit simonia, ideò ad forum ecclesiasticum recurratur, ut negotium ibi terminetur, quia

[1] "manum," MS. Rawl. C. 160.

[2] "Si de recordo." Such is the reading of both the editions of 1569 and 1640. "De corrodio" is evidently the proper side note.

[3] "corrodia," MS. Rawl. C. 160.

[4] "corrodiis," *id.*

rent proceeds from a chamber only, or from some tenement, but not through the hand of him who is the tenant of the chamber, but through the hand of the donor, which will be the same as from the chamber. But if the payment ought to be made through the hand of the tenant, and immediately from a certain tenement, if it has ceased, and since a distraint is not applicable, an assise in the defect of a distraint will be applicable. And in the same way, if a rent be granted from a certain tenement, more or less, as if any one from any manor of his own has granted to any one by the year and in fee ten pounds with the right of distraint or without it. And if with the right of distraint, it is either sufficient or it is not sufficient; but if sufficient, let him keep himself to a distraint, to whom the rent is due. But if there be none or it is insufficient, an assise will be applicable on account of the failure of a distraint, since the rent proceeds from a certain tenement, and because there, where distraint fails, an assise is applicable.

7. If of a record.

Likewise in making a view, if a view ought to be made of a corrody, I ask if any one can make a view for the jurors of any tenement? Yes, as it seems at first sight, because a priory or an abbey or another house is as it were a tenement from which such a return ought to proceed, whence it seems that it is sufficient if a view is made of the abbey, as of other tenements from which rent proceeds, as of a private house, but in truth an abbey of this kind and a priory are not tenements of any private man or individual person, and this kind of rentcharge is as it were the rentcharge of a chamber, and of which there is no distraint, and accordingly since corrodies of this sort are spiritual, or annexed to spiritual things, recourse is not to be had (if they be kept back) to the secular court, and since as in corrodies of this kind simony may be committed, therefore let recourse be had to the ecclesiastical court, that the business may be terminated, because there f. 180 b.

ibi fieri possit cognitio de simonia. Itē cùm disseysitus fecerit visum juratoribus, videre debent juratores utrū teñtum proprium sit vel commune, ut si commune sit inter cohæredes participes, vel vicinos, fiat visus de toto, tenendum in cōmuni, à quocunq; particeps fuerit disseysitus. Item utrum sit commune, sicut divisæ, quæ distinguunt & terminant fines agrorum, sive sit arbor vel fossatum vel lapis, vel quid tale.

Quod multiplex potest esse divisa inter vicinos. Britton, l. ii. ch. xix. § 2.

Et sciendū quòd multiplex potest[1] esse divisa inter vicinos, quæ dividunt dominia & distinguunt fines agrorum. Inprimis sicut regia via, quæ communis esse non potest inter vicinos, nec ꝑpria alicujus, sed ipsius dñi regis, & quasi res sacra, & qui aliquid inde occupaverit excèdendo fines & terminos terræ suæ, dicitur fecisse purpresturam super ipsum regem. Idem etiam dici poterit de via militari quæ publica dici poterit, & ducit ad mare, & ad portus, & quandoq; ad mercata. Itē fit divisa de consensu vicinorum ex eorum terra, & est talis divisa communis inter eos vicinos, ex quorum terris fuerit coadjuvata, & unde teñtum illud coadjuvatum dicitur commune inter eos, ita q; nullus dñs habet per se sed in communi. Et eodem modo si terra fuerit conjecta de communi cōsensu vicinorum ut fiat fossatum, vel murus ex communi tenemento: & dicitur divisa, eò quòd dividit agros & tenementa. Aqua verò currens non dicitur divisa, nisi quamdiu suum rectum cursum tenuerit, & cum alveum mutaverit, desinit esse divisa. Item divisa poterit esse lapis finalis, vel lignum, & hæc omnia communia sunt vicinorum, sed non alicujus eorum ꝑpria, ut infrà.

[1] "poterit," MS. Rawl. C. 160.

cognisance may be had of simony. Likewise when the disseysee has procured a view for the jurors, the jurors ought to see whether the tenement is private or common, as if it be common between coheirs, parceners, or neighbours, a view may be had of the whole, which is held in common, from whatever part a parcener has been disseysed. Likewise whether it be common, as divisions which distinguish and determine the boundaries of lands, whether it be a tree, or a foss, or a stone or something of that sort.

8. That the landmarks between neighbours may be manifold.

And it is to be known that the divisions between neighbours which divide lordships and distinguish the boundaries of lands may be manifold. In the first place such as a king's highway, which cannot be common between neighbours, nor the property of any one, but of the king himself, and as it were a sacred thing, and he who has occupied any part thereof by exceeding the boundaries and limits of his land, is said to have made an encroachment on the king himself. The same may likewise be said of a military road, which may be called public, and leads to the sea and to ports and sometimes to markets. Likewise a division is set up with the consent of the neighbours upon their ground, and such a division is common to those neighbours, out of whose lands it has been heaped up, and hence that tenement is said to be common between them, so that no lord has it by himself, but in common. And in the same way if earth has been thrown up together with the common consent of the neighbours so as to make a foss or a wall out of a common tenement, and it is called a division, because it divides lands and tenements. But running water is not called a division, except for so long as it keeps its straight course, and when it has changed its bed, it ceases to be a division. Likewise a division may be a boundary stone or a block of wood, and all these things are common between neighbours, but not the property of any of them, as below.

9. De visu faciendo.

Item videre debent utrum teñtum fuerit sacrum & Deo dedicatum, vel quasi sacrum, sicut publicum, vel universitatis, ut stadium, theatrum, muri, & portæ civitatum, non poterit quis teñtum libeř facere, sicut de redditu qui provenit ex re sacra. Abbatia verò sive priorat[2] sunt res sacræ, & solummodo in bonis Dei, & non in bonis alicujus privatæ personæ. Igitur cùm hujusmodi domus religiosæ res sacræ sint, non poterit quis convertere aliquid in usus privatorum, & facere de re sacra rem non sacram sive ꝑphanam, ita ꝙ ex re sacra, quæ Deo ꝑ pontifices dedicata est, possit quis habere liberum teñtum, & ideò nulla assisa novæ diss.; sed antequam res Deo dedicata esset, & sacrata, bene ꝑsset fundator excepisse & retinuisse sibi liberationes & hospitia, & hujusmodi, & ita hujusmodi nūquam fuerunt sacra, nec poterit redditus ꝑveniens de re sacra magis esse alicujus liberum tenementum, scilicet alicujus privatæ personæ, quā ipsa res de qua ꝑvenit. Item non poterit liberum tenementum redditus esse ꝑsonalis qui debetur, ut pertinens ad aliquā[1] rē ratione cujus petitur, & tamē non poterit habere redditum nisi habeat ipsam rem, cui & propter quam debetur: ut si quis habuerit hundredum aliquod, & sunt qui dant redditum ne sequantur, & quia ille redditus non provenit ex aliquo tenemento nec ratione alicujus tenementi, nec juratores visum facere possunt de aliquo tenemento. Item sicut oportet visum facere de tenemento de quo redditus provenerit, ita videre debet tenementum propter quod præstatur redditus, ut si quis certum redditum constituerit alicui de camera sua & hæredū suorum, ut aquam ducere possit per fundum suum, si talis aquam duxerit vel non duxerit. Item si redditum constituerit quis eodem modo, ut habeat in alieno jus pascendi vel eundi vel

f. 181.

[1] "aliam," MS. Rawl. C. 160.

Likewise they ought to see whether the tenement is sacred and dedicated to God, or as it were sacred, as public, or belonging to a corporation, as a race-ground, a theatre, walls and the gates of cities; a person cannot make a tenement free, as in the case of a rent which is derived from a thing sacred. But an abbacy or a priory are sacred things and amongst the goods of God, and not amongst the goods of any private persons. Therefore since religious houses of this kind are sacred things, a person cannot convert any thing into private use, and make of a sacred thing a thing not sacred or profane, so that a person may have a free tenement of a sacred thing which has been dedicated to God by the pontiffs, and on that account there is no assise of novel disseysine; but before a thing is dedicated to God and consecrated, the founder may well have excepted and retained for himself liveries and lodgings and such like, and so things of this kind have never become sacred, nor can the rent proceeding from a sacred thing be the freehold of any one, to wit of any private person, any more than the thing itself from which it proceeds. Likewise a personal rent which is due as pertaining to some thing by reason of which it is claimed, cannot be a freehold, and at the same time a person cannot have a rent unless he has the thing to which and on account of which it is due; as if a person has a certain hundred, and there are persons who give a rent not to attend, and because that rent does not proceed out of any tenement nor by reason of any tenement, nor can the jurors hold a view of any tenement. Likewise as it is incumbent to hold a view of the tenement on account of which a rent is paid, as if a person has assigned to another person a certain rent from his chamber and from that of his heirs, that he may conduct water through his land, if such a person has or has not so conducted water. Likewise if a person has appointed a rent in the same way, that he may have a right of pasturage in another person's land, or a right of way

9. Of making a view.

f. 181.

aliud quid tale faciendi, sive alius aquam duxerit, vel paverit, vel diverterit, vel aliquid tale fecerit vel non, semper tamen debetur redditus, & pro redditu servitus, unde si aliquis ipsorum contrahentium recedere voluerit à contractu, tamen alius ubi voluerit non recedet, & unde si ille qui servitutem concesserit redditum percipere noluerit, nihilominus tamen debetur servitus, & jus eundi, aquamve ducendi & jus pascendi. Si autem servitus concedatur, & redditus denegetur vel detineatur, nec sit locus vel tenementum ubi districtio fieri possit, locus erit assisæ novæ disseysinæ quasi de libero tenemento. Et si nō sit tenementum de quo redditus provenerit, & de quo visus fieri possit, tamen sufficit si fiat visus de tenemento propter quod debetur redditus, & quia si fieret districtio in servitute debita, verbi gratia. Ut si constitueretur redditus, quod ducere posset quis aquam per fundum alienum, & cessatum esset in redditu solvendo, non posset ille, cujus fundus esset, pro districtione facienda aquam divertere vel diminuere, quo minus cursum suum debitum haberet & statutum, quin faceret disseysinam ei cui servitus deberetur, nisi ita conveniret in constitutione servitutis. Durum esset & iniquum quòd unus haberet cursum & alius de redditu sine aliquo regressu fraudaretur: competit ei igitur assisa novæ disseysinæ ratione prædicta, & eò quòd deficit districtio, & fiat visus de tenemento propter quod debetur, non de quo redditus provenit, quod fieri non poterit, sed propter quòd redditus debetur à vicino. Sed hoc locum habet, ubi ille cui servitus constituta fuit non

through it, or a right of doing something of the kind, whether another has conducted water, or has pastured cattle, or has halted there, or has done something of like kind or not, the rent nevertheless is always due, and in return for the rent the service; wherefore if any of the contracting parties has wished to recede from the contract, nevertheless another when he has wished will not recede, and whence if he who has granted the service is unwilling to receive the rent, nevertheless the service is still due, and the right of way and of conducting water, and the right of pasturage. But if the service is granted, and the rent is denied or kept back, and there is neither place nor tenement where a distress can be levied, there will be a place for an assise of novel disseysine as concerning a freehold. And if there be no tenement from which the rent proceeds and of which a view can be held, nevertheless it is sufficient if there be a view of the tenement on account of which the rent is due, and because if a distress is made in the service due, for example. As if a rent be appointed that a person may conduct water across another person's land, and there has been a cessation in the payment of the rent, he whose land it may be could not divert or diminish the water with a view to making a distress, so as to prevent it having its due and appointed course, without causing a disseysine to him to whom the servitude is due, unless it was so agreed upon in the appointment of the servitude. It would be a harsh and inequitable thing that one should have the watercourse and the other should be defrauded of his rent without any resource; he is therefore entitled to an assise of novel disseysine for the reason aforesaid, and inasmuch as a distress fails him, and let a view be had of the tenement on account of which it is due, not from which the rent proceeds, which cannot be effected, but on account of which a rent is due from the neighbour. But this is applicable, where he to whom the service is

curat ulteriùs aquam ducere, quia semper remanet tenens licèt aquam ducere nolit. Melius tamen est, quòd fiat districtio pro redditu tali modo quo fiat summonitio, & quòd per judicium capiatur aqua in manum domini simpliciter sine aliqua mutatione vel diversione, & quia[1] si tunc non venerit nec satisfecerit de redditu, capiatur ex secundo decreto & adjudicetur domino suo sic, quòd illam divertere poterit, donec ei satisfactum fuerit de redditu, & quòd semper paratus sit restituere cùm ei fuerit satisfactum. Item si fiat aliquid in fundo alicujus quod vicino noceat injustè, ut si fossatum vel murus levetur vel prosternatur injustè, vel aliud quiddam fiat ad nocumentum injustum vel injuriosum, non solùm sufficit videre tenementum quod nocet, sed etiam illud cui nocitum est. Item si jus eundi vel pascendi debeatur vel aliud tale, non solùm sufficit visum facere de tenemento in quo jus illud constituitur, sed etiam illud ad quod jus pertinet. Unde oportet videre tenementum ubi pastura est, & tenementum ad quod pertinet pastura. Si autem nesciat ille qui queritur, vel non possit tenementum designare, secundùm quod prædictum est, qualitatem, nec quantitatem, locum, nec comitatum, nec villam, nec aliud certum, nihil dare possunt querenti per assisam, sed cadit omnino breve quantum ad assisam. Et cadit quandoque in perambulationem coram justitiariis ex consensu partium, ut si dissensio habeatur de finibus & terminis terræ, cõm, vel fundorum, vel locorū, vel in qua parte, cùm habebit assisam in aliqua parte, nec in meliori nec in pejori nec in posteriori, quia jus respicit æquitatem. Si autem querens locum designaverit, sed in qua parte loci nesciat designare, sufficit si in aliquo loco habeat seysinam p

Britton, l. ii. ch. xx. § 4.

f. 181 b.

[1] "qui," MS. Rawl. C. 160.

appointed does not care any longer to conduct the water, because he always remains the tenant although he does not conduct the water. It is better however, that a distress be made for the rent in the same manner in which the summons has been made, and that by a judgment the water be taken into the hand of the lord simply without any change or diversion, and who if he has not then come and satisfied the rent, let it be taken after a second decree, and let it be adjudged to the lord thus, that he may divert the water until he has been satisfied concerning the rent, and that he shall be always prepared to restore it, when the rent has been satisfied. Likewise if a thing be done on the land of any one which hurts his neighbour unjustly, as if a foss or a wall has been raised or thrown down unjustly, or any other nuisance unjust or injurious be caused, it is not sufficient solely to view the tenement which causes the nuisance, but likewise the tenement to which the nuisance is caused. Likewise if a right of way or of pasture be due, or something of such kind, it is not sufficient to take a view of the tenement in which that right is contained, but likewise that to which the right pertains. But if he who complains does not know how, or is not able to designate the tenement, according to what has been said above, its quality, quantity, place, nor the county nor the vill, nor any other certain thing, nothing can be given to the complainant by the assise, but the writ fails altogether as regards the assise. And it sometimes falls into a perambulation in the presence of the justices with the consent of the parties, as if there be a dissension f. 181 b.
concerning the limits and boundaries of the land, of the county, or of the estates, or the places, or in what parts, when he shall have an assise concerning a certain part, neither for a better, nor for a worse, nor for one further back, because right respects equity. But if the complainant has designated the place, but does not know how to designate the particular part, it is sufficient if he shall have seysine by the oath of the jurors in

sacramentum juratorum. Si autem de certa parte loci constiterit, sed nesciat querens fines & terminos distinguere, eò quòd termini & lapides finales amoti sunt fortè, tunc ei assignabitur tantū, quantū juratores crediderint ipsum esse disseysitum, quia etsi justitiarii semp certū reddere non possint judicium, eò quòd de incerta re agitur apud illos, tamē hoc facere debent quantū eis fuerit possibile. Sunt autem quidam juratores qui sine visu faciunt sacramentum, & ita jurare debent q veritatem dicent secundùm conscientiam suam, salvo visu in modum juratæ: sed tamen de talibus distinguendum erit, utrum ab initio electi fuerint p vic. vel p ballivum, & præceptum fuerit ut visum facerent, & ipsi hoc facere contēpserunt, & ita q de negligentia nullam habuerint excusationem: in quo casu & si de hoc convicti fuerint q p negligentiam hoc fecerint & contemptum, graviter amercientur. Et si contingat quòd de perjurio in assisa facta convincantur, pœnam non evadent convictorum nec quantū ad infamiam nec quantū ad pœnam, quia magis delinquunt q alii juratores p contemptum. Et ideò æqualis pœna eis infligitur, cùm de jure major ꝑpter contemptum esset eis infligenda, & hoc suæ imputare poterunt negligentiæ. Si verò non sunt pri[ꝰ] electi sed loco aliorum, qui non veniunt fortè, vel si venerint certa ratione recusantur eò q inutiles sunt vel alio modo substituuntur, tunc videndum est utrum fuerint de proximo vicineto, vel longè à remotis alibi assumptis,[1]

[1] "assumpti," MS. Rawl. 160.

any part. But if a certain part of the place has been established, but the complainant knows not how to distinguish the limits and the boundaries, inasmuch as the landmarks and boundary stones have been removed by chance, then there shall be assigned to him so much as the jurors believe him to have been disseysed of, for although the justices cannot always render a sure judgment, inasmuch as an uncertain thing is in action before them, nevertheless they ought to do this, as far as is possible for them. But there are some jurors who make their oath without a view, and they ought in such case to swear that they will speak the truth according to their conscience, saving a view after the manner of a jury; but concerning such persons a distinction is to be made, whether they have been chosen from the commencement by the viscount or by the bailiff, and they have been instructed to make a view, and they have contemned to do this, and thus they have no excuse concerning their negligence; in which case, and if they have been convicted of this that they have acted through negligence and contempt, they shall be heavily amerced. And if it happens that they be convicted of perjury in making the assise, they shall not escape the punishment of convicted persons, neither as far as regards infamy or as regards the penalty, because they commit a greater offence than other jurors on account of their contempt. And therefore an equal punishment is inflicted upon them, when of right a greater punishment ought to be inflicted upon them on account of their contempt, and this they will be able to impute to their own negligence. But if they have not been chosen in the first instance, but in the place of others, who have by chance not come, or if they have come, have been refused for certain reasons inasmuch as they are useless, or have been substituted in some other way, then it must be seen if they are of the next visne, or from far remote places assumed from elsewhere, and whether it is

& utrum verisimile sit vel præsumi possit q̃ veritatem nesciant vel ignorent. Si autē p̃sumi possit q̃ veritatē sciverint de facto, secundùm q̃ res se habet, de loco tamen & quantitate rei dubitaverint, quoad hoc ultimum excusantur, quia visum nō fecerunt de teñto. Si autem in narratione facti & veritatis mentiti fuerint scienter, non excusantur in hoc, quantū ad pœnam convictorum, sed vix quantū ad infamiā, & p̃ eo q̃ visum non fecerint excusantur. Si autem longè à remotis assumpti fuerint p̃pter defectū aliorum, & ita q̃ præsumi possit q̃ veritatem ignorent, excusantur quantū ad pœnam & quantū ad infamiam, quia visum non fecerunt, & similiter quia à remotis assumpti sunt, & in veritate errare possunt, & ideò non mentiuntur neq̃ se pejerant, quia contra conscientiam non vadunt, nec cōsentit qui errat. Sunt etiā qui jurant omnino sine visu in modū juratæ, q̃ esse non debet ut alibi? ut,[1] esto q̃ assisa capi debeat in modū assisæ, cùm nihil excipiatur conī assisam corā justit. nec sit ratio quare cadere debeat in juratā, & cùm omnes juratores electi sint in ipsa curia coram just. cùm citò recessuri sunt[2] & quasi ex improviso dicere debeant veritatem, cùm visus de tenemento eis non fiat, nec sciverint utrum aliquid dare debeant querenti plus vel min[9], vel totum auferre, nec sit locus convictioni, periculosum erit querenti & tenenti quòd procedat negotium sub jurata, & etiam magis erit periculosum juratoribus propter alieni compendii lucrum anceps

[1] "ut alibi, quia," MS. Rawl. C. 160. | [2] "fuerint," *id.*

probable or it may be presumed that they do not know or are ignorant of the truth. But if it can be presumed that they knew the truth concerning the fact, according to which the thing was, but had doubts of the place or of the quantity of the thing, as far as this last is concerned they are excused, because they have not made a view of the tenement. But if in their narration of the fact and of the truth they have knowingly lied, they are not excused in this matter, as far as regards the penalty of convicted persons, but as regards infamy, they are with difficulty excused for not having made a view. But if they have been assumed from places far remote on account of the failure of others, and so that it might be presumed that they were ignorant of the truth, they are excused as regards the penalty, and as regards infamy, because they have not had a view, and in like manner because they have been assumed from remote places, and might err in the truth, and therefore they do not lie nor perjure themselves, because they do not go against their conscience, nor does he consent who makes an error. There are also persons who swear altogether without a view in the manner of a jury, which ought not to be, as elsewhere. As let it be, that an assise ought to be held after the manner of an assise, when no exception is taken before the justices against the assise, nor is there any reason why it should be turned into a jury, and when all the jurors have been chosen in the court itself in the presence of the justices, when they are about quickly to retire, and ought as it were suddenly to declare the truth, when no view is made by them of the tenement, and they do not know whether they ought to give anything, more or less, to the complainant, or to take away all, and there is no place for a conviction, it will be perilous for the claimant and for the tenant that the business should proceed under a jury, and it will be even more perilous for the jurors on account of the doubtful gain of another person's advantage to under-

f. 182. subire ꝑjurium. Quòd autem assisa capietur in modū assisæ, hoc stare non poterit aliqua ratione, quia primus jurare non potest salvo visu ꝑpter verba in sacramento exponenda, quia jurabit ꝙ dicet veritatem de teñto de quo sic visum fecit ꝑ præceptum dñi regis, sed nullum teñtum vidit, nec ꝑ præceptum dñi regis nec sine, igitur de nullo teñto quod viderit dicere poterit veritatem, quia nullum tale teñtum vidit, & ideò si ita juraverint juratores, pejerant manifestè, quia non convenit sacramentū cum veritate, s. de teñto unde visum non fecerint. Si autem ita juraverint, s. de teñto de quo visum fecerint, & posteà in fine (salvo visu) non valet, quia sic erunt sibi ipsis cōtrarii. Quòd autem assisa capi debeat in modum juratæ sine causa manifesta non video rationem. Sed quid si fuerit in assisa inter partes disputatum, & ꝙ ꝑ incidentem questionem de consensu partium vertatur assisa in juratam ? bene procedet jurata etiam sine visu.

10. De summonitione facienda disseysitoribus attachiatis.

Item cùm vic. disseysitores attachiaverit ꝙ sint in adventu justit. sive justitiarii qui[1] constituti fuerint ad omnia placita generaliter sive ad quædam specialiter, sicut ad assisas novæ disseysinæ & mortis antecessoris capiendas, & gaolas deliberandas vel ad aliquā assisam specialiter, sicut sunt quatuor milites de coñ, vel unus justitiarius specialiter transmissus à latere regis, ꝙ assumptis tecum &c. secūdùm ꝙ suprà dictum est in principio de civilibus actionibus sive criminalibus. Quæritur an tales attachiati ante adventum justit. rationabilem habere debeant summonitionem quindenæ ?

[1] "qui" omitted, MS. Rawl. C. 160.

take perjury. But that the assise shall be held after the manner of a jury, this cannot stand with any reason, because the first cannot swear saving a view on account of the words to be set forth in the oath, because he shall swear that he will speak the truth concerning the tenement of which he has so had a view under the precept of the lord the king, but he has viewed no tenement, neither under the king's precept nor without it, therefore he cannot speak the truth concerning any tenement which he has seen, because he has seen no such tenement, and for that reason if the jurors have so sworn, they manifestly perjure themselves, for their oath does not agree with the truth, to wit, concerning a tenement of which they have not had a view. But if they have so sworn, to wit, concerning a tenement of which they have had a view, and afterwards in the end (saving the view), it does not avail, for thus they will be in contradiction with themselves. But that the assise should be taken in the manner of a jury without a manifest cause I see no reason. But what if a dispute should arise between the parties in an assise, and if with the consent of the parties through the incidental question the assise be converted into a jury? The jury may well proceed without a view. f. 182.

10. Of making a summons against disseysors, who have been attached.

Likewise when the viscount has attached disseysors, that they be present on the arrival of the justices, whether they are justices who are appointed to hear all pleas generally, or certain pleas specially, as to hold assises of novel disseysine or the death of an ancestor, and to deliver gaols, or for some assise specially, just as are the four knights of the county, or one justice specially despatched from the side of the king, that having assumed with you &c., according to what has been said above at the commencement concerning civil or criminal actions. It is asked whether such persons having been attached before the arrival of the justices ought to have a reasonable summons of fifteen days? and the truth is

& est verum q non, quia sive quindenam habuerit sive min^{o} spacium, diem causare non poterunt, quia sive venerit sive non, capienda erit assisa, & quia tantū operatur eorum absentia quantū præsentia. Nec injuria disseysinæ essonium habebit, nec longas inducias, nec judiciorum solennitates, quia viribus & sine judicio fecerunt disseysinam, quod est manifestè contra justitiam & pacem domini regis. Item si per se venire non possint, possunt tamen venire per ballivos suos, & etiam per amicos suos qui verba p eis faciant, & quorum responsio admittetur ad instructionem juratorum, & etiam declinandam assisam. Cognoscere autem non possunt disseysinam nec pacisci, nec remittere, sicut inferi^{o} dicetur.

Britton, l. i. ch. xv. § 1.

Cap. XVII.

1. Si disseysitus, cum attachiatus fuerit, debeat habere rationabilem summonitionem, et de modo recedendi sive retrahendi se a placito.

In adventu autem justitiariorum si nullus venerit, nec querens nec ille de quo queritur, tunc erit assisa quasi vacua, & omnes plegii sui erunt in misericordia. Si autem ille de quo queritur venerit, & querens non, plegii & querens erunt in misericordia, & ille de quo queritur recedet sine die, nisi querens se velit essoniare, quod bene ei licebit, sed querens ad aliud breve consimile si voluerit recuperabit. Si autem querens venerit, & alius non, plegii de attachiamento erunt in misericordia, & ipse similiter, si fuerit attachiatus, & capietur assisa per defaltam ut infrà. Si autem nulla pars venerit, nec querens nec ille de quo queritur, p judicium curiæ quieti recedant & omnes in misericordia,

f. 182 b.

that they ought not, because whether they have fifteen days or a less space, they cannot allege a day in excuse, because whether they have come or not, the assise will have to be held, and their absence has the same effect as their presence. Nor does the injury of disseysine allow of an essoin, nor of a long truce, nor of the solemnities of judgments, because they have made the disseysine with force and without a judgment, which is manifestly against justice and the peace of the lord the king. Likewise if they cannot come in person, they may come by their bailiffs, and even by their friends, who may speak for them and whose answer shall be admitted for the instruction of the jury, and even to decline the assise. But they cannot acknowledge the disseysine, nor bargain, nor remit, as shall be explained below.

Chapter XVII.

Upon the arrival of the justices, if no one appears, neither the complainant, nor he concerning whom a complaint is made, then there will be as it were an empty assise, and all the sureties will be amerciable. But if he appears, concerning whom a complaint is made, and not the complainant, the sureties and the complainant will be amerciable, and he concerning whom the complaint is made will retire without a day, unless the complainant wishes to essoin himself, which will be allowable to him, but the complainant upon a similar writ, if he wishes, shall recover. But if the complainant comes, and the other not, his sureties under the attachment will be amerciable, and himself likewise if he has been attached, and the assise shall be held by default as below. But if no party has appeared, neither the complainant, nor he, concerning whom the complaint is made, let them retire acquitted by the judgment of the court, and all will be amerciable, to wit, the principal parties and the sureties. f. 182 b.

1. If a disseysor, when he has been attached, ought to have a reasonable summons, and of the manner of receding or of withdrawing oneself from a plea.

scilicet principales ꝑsonæ & plegii. Item in adventu justit. aut omnes veniūt tam querens quā ille de quo queritur, secundꝫ q̄ fuerint unus vel plures, quo casu, statim ꝓcedatur ad assisam, nisi fortè de gratia justit. in casu licito velint transigere vel pacisci. In quibusdā verò casibus nihil aliud erit, nisi q̄ querens se retrahat, vel ille de quo queritur cognoscat disseysinam. Et qui se ita in principio sine aliquid causa justa simpliciter retraxerit, sive in assisa disseysinæ, sive in alia quacunq̄ assisa vel placito, nunquam ad consimile breve recuperabit. Si autē incepta fuerit assisa vel placitum quodcunq̄ & error fortè fuerit in impetratione, ita q̄ breve stare non possit, sed cadat tanquam vitiosum, sive querens dicat q̄ sequi noluerit breve illud, vel se simpliciter retrahat, vel licentiā recedendi petat, vel alio quocunq̄ modo, ad aliud breve recuperare poterit q̄ non sit vitiosum, quia ad actionem non respondetur, nec conſ actionem recipitur,[1] sed conſ breve, ꝓpter vitium & errorem, & actio in se integra est & non incepta. Et unde cùm nihil in judicium deducatur nisi exceptio contra breve, si simpliciter se retrahat à brevi, non tamē se retrahit ab actione quæ in judicium non deducitur, nisi expresse dicat q̄ se retrahat ab utroq̄. De errore verò brevis infrà dicetur de exceptionibus, sed quicunq̄ & qualitercūq̄ se retraxerit simpliciter sive dicat, retraho me de brevi isto, vel recedo, vel nolo ampliùs sequi, vel alio modo, impunè non recedet: quia ipse & plegii sui de ꝓsequendo erunt in misericordia. Cùm autē petant licentiā rece-

Britton, l. ii. ch. xv. § 5.

[1] "excipitur." MS. Rawl. C. 160.

Likewise on the arrival of the justices either all come, as well the complainant as he concerning whom complaint is made, according as they are one or more, in which case let them proceed at once to the assise, unless by chance by the grace of the justices in an allowable case they are willing to settle it or to make an arrangement. In some cases, however, there will be nothing else to be done except for the complainant to withdraw himself, or for him, concerning whom the complaint is made, to acknowledge the disseysine. And he, who has withdrawn himself thus at the commencement simply without any just cause, whether in an assise of disseysine or in any other assise or plea, shall never recover on a like writ. But if an assise has been commenced or any plea, and there has been an error in the suing out the writ, so that the writ cannot stand, but it fails as being faulty, whether the complainant says that he does not wish to follow up that writ, or simply withdraws himself, or prays leave to retire, or in some other way, he may recover upon another writ which is not faulty, because no answer is made to the action, nor is any objection taken to the action, but to the writ on account of defect and error, and the action in itself is entire and not commenced. And hence, as nothing is brought into judgment except the exception to the writ, if he simply withdraws himself from the writ, he does not thereupon withdraw himself from the action, which is not brought into judgment, unless he expressly says that he withdraws himself from both. But concerning an error of the writ it shall be explained below in treating of exceptions, but whosoever and in whatsoever way he shall withdraw himself simply, or if he shall say, I withdraw myself from this writ, or I recede, or I am unwilling to pursue the case further, or in some other way, he shall not recede with impunity, because he himself and his sureties for the prosecution shall be amerciable. But when they seek the liberty of receding, and it is granted

dēdi & eis gratis concedatur, impunè recedēt. Si autem bŕe cōpetens sit, & nihil scit q excipi poterit contra breve nec conſ psonā, si res & actio in judicium deducantur, & non sit error in quantitate rei petitæ, si tunc petat licentiam recedendi, simpliciter recedit ab utroq & nunquā ad aliud breve cōsimile recuperabit. Item si dicat, retraho me versus talem fortè, quia nihil tenet, in quo casu nihilomin⁹ ad aliud bŕe recuperabit versus aliū qui tenet, licèt versus eum qui non tenuit recessit ab utroq. Sed esto q ille versus quem se retraxit jam de novo inceperit possidere, cōpetit contra illum cōsimile bŕe, non obstante exceptione q se retraxit pri⁹, quia jam incipit cōpetere actio versus eum, ubi prius non competebat. Et unde semper videndum erit utrū se retraxerit de brevi tantùm, propter vitium brevis, vel de brevi & assisa, expresse vel tacitè, & si eadem sit persona & eadem res vel diversa: & utrū actio pri⁹ non competiit, quia tenens non tenuerit, & posteà competere inceperit, quia tenens de novo inceperit possidere. Sed quærendum, si p primum breve posset agere, cùm jam pervenerit in eum casum, à quo incipere potuit. Sed revera non, quia tempore impetrationis nulla subfuit causa impetrandi, quod perpendi poterit per datam. Illud autem locum habet infrà de exceptionibus, ubi quis excipit quòd totum non teneat, vel quòd omnino nihil. Item esto quòd aliquis se retrahat de brevi, cum tenens falso dicat q non possideat, cum possideat revera, & idem tenens alias conveniaŧ ab eodē p consimile breve,

to them gratuitously, they shall recede with impunity. But if the writ is competent, and he knows nothing which can be excepted against the writ or against the person, if the thing and the action are brought into judgment, and there is no error in the quantity of the thing claimed, if he then seeks leave to withdraw, he simply withdraws from both, and he shall never recover upon any similar writ. Likewise if he says, I withdraw myself as against so and so by chance, because he holds nothing, in which case nevertheless he shall recover upon another writ against another who holds, although as against him who has held nothing he has withdrawn from both. But let it be that he, against whom he has withdrawn himself, has now begun anew to possess something, he is entitled to a similar writ against him, notwithstanding the exception that he has withdrawn himself beforehand, because an action now commences to be admissible against him, where it was not admissible before. And hence it is always to be seen whether he has withdrawn himself from the writ only, because of a defect in the writ, or from the writ and the assise, expressly or tacitly, and if it be the same person and the same thing, or different; and whether the first action was not admissible, because the holder did not hold it, and afterwards it began to be admissible, because the holder began anew to possess. But it is to be asked, if he could have proceeded by the first writ, when he arrived at a case in which he could proceed. But indeed he could not, because at the time of suing out the writ there was no real cause of suing it out, which could be ascertained by the date. But that consideration has a place below in treating of exceptions, where a person excepts, that he does not hold the whole, or that he holds nothing at all. Likewise let it be, that some one withdraws himself from a writ, when the tenant says falsely that he does not possess, when in truth he does possess, and the same tenant is otherwise

non habebit talis tenens talē exceptionē, q̄ se retraxeř petens, in odiū mendacii, sed sine judicio p̄pt̄ mēdaciū
f. 183. spoliād[9] erit, secundum W. de Eborū: vel si cum dixerit aliquando tenens in judicio quod nihil clamat in tali re, si postmodū velit de eadē re versus eundē petentē defendere se per exceptionē, vel si ad hoc agat quod nihil petit, nisi quòd uti possit jure suo & seysina, quare alius eum inde inquietat vel impedit, non audietur, quasi sibi ipsi cōtrarius, sicut dici possit in jure advocationis, ut si quis dicat se nihil habere in jure advocationis: si postmodū velit agere contra primā petitionem per Quare impedit, quia in hoc contrarius est sibi, si dicat primò quòd nihil teneat, & postmodùm quòd ad ipsum pertinet jus præsentandi, quia simul stare non possunt in una persona & eodē tempore. Si autem talis, qui dicebat se possidere cùm nihil possideret, & postea ex causa possidere inceperit, vel ex causa donationis vel emptionis vel fortè, quia vocatus est ad warantū, hic poterit se defendere vel ex tali nova causa agere, nec habebit exceptionē quod aliàs se retraxerit, cum nihil possideret. Si autem aliquis se retraxerit à judicio, ubi judiciū erit, & à brevi, non poterit agere postmodū per consimile. Itē si semel sit in judicio & se retraxerit de brevi de recto, postmodum ad inferiora descendere non poterit. Si autē tantum à brevi, ubi nullum judicium, bene poterit descendere ad inferiora, ubi tenens nihil tenuit vel mentitus fuit, dicendo se non tenere cùm teneret. Itē si quis negaverit quòd possederit, agere non poterit nec se defendere contra petentē cui mentitus est, ex

convened by the same person with a similar writ, such tenant shall not have an exception of this kind, that the claimant has withdrawn himself, as a lie as hateful, and he shall be deprived on account of his lie without a judgment according to William of York; or if the tenant f. 183. has once said in a judgment that he claims nothing in such a thing, if he should afterwards wish to defend himself by an exception concerning the same thing against the same claimant, or if he adds to this that he seeks nothing but to be able to enjoy his own right and seysine, wherefore should another disturb him and hinder him therein, he shall not be heard, as if being in contradiction to himself, as may be said in a right of advowson, as if a person should say that he has nothing in a right of advowson, if he afterwards wishes to proceed against the first claim by a Quare impedit, because in this he is in contradiction to himself, if he says first of all that he holds nothing, and afterwards says that the right of presentation belongs to him, because they cannot stand together in one person at the same time. But if such a person, who said that he possessed when he possessed nothing, and afterwards from some cause has commenced to possess, either from a cause of donation or of purchase, or by chance, if he has been called to warrant, he will be able to defend himself or to proceed upon such a new cause, nor shall he be liable to an exception that he has at another time withdrawn himself, when he possessed nothing. But if a person has withdrawn himself from a judgment, where there shall be a judgment, and from a writ, he cannot afterwards proceed by a similar writ. Likewise if he has once been in judgment and has withdrawn himself from a writ of right, he cannot afterwards descend to inferior issues. But if only from a writ where there was no judgment, he may well descend to inferior issues, where the tenant has held nothing or has lied, in saying that he did not hold when he did hold. Likewise if any one has denied that he possessed, he cannot proceed nor defend himself against the claimant

aliquo jure vel causa præcedente mendacium, tamē ex causa subsequēti benè potest. Si autem ille qui dixit, quod nihil tenuit quando talis se retraxit, incipiat postmodū defendere sicut tenens & petat judicium de petenti, qui dicat se possidere, si ipse sit in possessione, ex quo tunc petiit, quia propter hoc quod petiit dixit se esse extra possessionē, non minus valebit sua responsio propter mendacium, verbi gratia.

2. Casus de priori de Kynelworth et Waltero de Insula.

Esto quòd aliquis dicat se jus habere in aliqua advocatione, & ei petenti per breve de recto respondeat tenens, quod advocationē non teneat sed alius talis, & qd nihil juris clamat in eadem, & petens sic retraxerit se à brevi, & non perquisiverit sibi versus eum, de quo dicitur quòd in seysina,[1] sive hoc verum sit sive non, saltem ad convincendum mendacium excipientis, si postea contingat ecclesiam illam vacare, & uterque istorum præsentaverit, tam ille qui se retraxerit, quàm ille qui dicebat se nihil tenere, neuter eorum aliquid consequatur (ut videtur), petens, quia per hoc quod petiit dicebat se esse extra possessionē, & postea se retraxerit, & nihil sibi postmodū perquisivit. De tenente ergo videndum, utrum mentitus fuit excipiendo, vel verum dixit, si verum, & ille, qui revera tunc tenuit jus suum, postmodū ei recognovit & remisit, vel fortè ei præsentanti non cōtradixit: valet præsentatio tenentis, si autem mentitus fuit, adhuc valet præsentatio tenentis, & remanet mendacium impunitū, eo quòd nullus fuit prosecutus ad illud mendacium convincendum, & sic de novo incipiat petens agere, si confidat de jure. Si autē ille de quo queritur præsens disseysinā cognoverit, mittendus est à gaolæ,[2] eo quòd inju-

[1] "quod sit in seysina." MS. Rawl. C. 160.

[2] "gaolæ" is the reading of MS. Rawl. C. 160, the ablative particle being omitted.

to whom he has lied, upon any right or cause preceding the lie, but he well may upon a subsequent cause. But if he, who said that he held nothing when such a one withdrew himself, begins afterwards to defend himself as tenant and seeks a judgment against the claimant, who says that he possesses, if he himself should be in possession, from the time when he then became a petitioner, because he said that he was out of possession on this account that he was the petitioner, his answer shall not the less avail because of the lie, for instance.

2. The case of the prior of Kenilworth, and Walter of the Isle.

Let it be that some one says that has the right in a certain advowson, and the tenant answers him when claiming by a writ of right that he does not hold the advowson, but a certain other person, and that he claims no right in it, and the plaintiff thereon withdraws himself from the writ and does not proceed against him, of whom it is said that he is in seysine, whether this be true or not, at least for the purpose of convicting the falsehood of the exceptor, if it happens afterwards that the church is vacant, and each of them has presented, as well he that withdrew himself, as he who said that he held nothing, neither of them would obtain anything, as it seems, the plaintiff, because by the fact that he was a claimant he declared himself to be out of possession, and afterwards withdrew his claim, and pursued the matter no further. Let us see therefore respecting the tenant, whether he lied in excepting or spoke the truth, if he spoke the truth and he who in reality was then tenant afterwards recognised his right and restored it, or by chance has not contradicted his presentation, the presentation of his tenant hold good, but if he has lied, still the presentation of the tenant hold good, and the lie remains unpunished, because nobody prosecuted to convict the lie, and so let the claimant, if he has confidence in his right, begin to proceed anew. But if he against whom the complaint is made is present and admits the disseysine, he is to be sent to gaol because he has

riam cognoverit, quæ est contra pacem. Præsente siquidem querente & præsentibus recognitoribus omni-
f. 183 b. bus, cùm disseysitor præsens non fuerit, nec per se, nec per ballivum suum, nec per aliū qui pro se verba facere possit, procedet assisa & recognitio per defaltam, quia nulli parcendum est in hac parte, majori nec minori, nec differenda erit assisa pro aliquo, nec etiam ipse rex esset expectandus, si in veniendo esset ad portam. In isto tamen casu erit querens diligenter examinandus, & juratores diligentissimè instruendi ad veritatem dicendam, cùm ille super quem venit assisa (si præsens esset) excipere posset contra assisam, & dicere quare remaneret, & ideo querens diligenter examinand^{9} est quod doceat diligenter, qualiter sit suum liberū tenementū, & quem ingressum habuerit in tenementum illud, secundum quod inferius plenius dicetur de interrogationib^{9} à justitiariis faciendis. Et quo casu, si juratores malè juraverint, convincendi sunt de perjurio, sive male juraverint de articulis assisæ, sive de circumstantiis quæ assisam non tangunt, quia capitur assisa in modum assisæ & non juratæ de partium consensu.

Cap. XVIII.

1. De interrogationibus, cum partes comparaverint in judiciis, et de officio justiciariorum in hujusmodi placitis.

Partibus autem in judicio comparentibus, & audito brevi per quod judex habeat cognitionem, & confirmata persona ejus, audito brevi & querela, oportet inquirere imprimis à quærente si habeat querelam, quod possit esse pars in judicio, & ideo videndum est de officio justiciarii. Officium autem ejus est, diligenter causam examinare, & non solum diligenter, imo diligentissimè,

recognised the injury which is against the peace. If the complainant however be present and all the recognisors are present, when the disseysor is not present, neither in person nor by his bailiff nor by another who can speak for him, the assise shall proceed and the recognition by default, because no one is to be spared in this part, whether he be greater or less, nor is the assise to be deferred for any one, nor even is the king himself to be waited for, if he was coming and at the door. In this case however the complainant will have to be diligently examined, and the jurors most diligently instructed to say the truth, since he against whom the assise is brought (if he be present) can except against the assise, and say why he remained behind, and therefore the complainant is to be diligently examined that he may explain diligently of what kind his free tenement is, and what entry he has had into that free tenement, according as will be explained below in treating of the interrogatories to be administered by the justices. And in which case, if the jurors have sworn ill, they are to be convicted of perjury, whether they have sworn ill concerning the articles of the assise, or concerning the circumstances which do not touch the assise, for the assise is held after the manner of an assise, and not of a jury with the consent of the parties. f. 183 b.

Chapter XVIII.

1. Of putting interrogatories when the parties have appeared in judgment, and of the office of the justiciaries in a plea of this kind.

But on the parties appearing in judgment, and the writ having been heard by which the judge has cognisance, and his person having been confirmed, the writ and the plaint having been heard, it is proper to inquire in the first place from the complainant if he has a complaint, that he may be a party in the judgment, and therefore we must see concerning the office of the judge. But it is the office of the judge to examine diligently the cause, and not merely diligently but most diligently, according to the saying of the blessed Job,

secundum illud beati Job, qui dixit, Causam quam ignorabam diligentissime examinabam. Iterrogare enim debet partes, tam actoris quam rei, actoris, i. petentis vel querentis de jure sive querela ut sciri possit per hæc si habeat actionem vel querelam, & etiam ut per hoc sciri possit utrum recognitio procedere debeat in modum assisæ vel juratæ. Inprimis de quo tenemento. Item interrogare debet illum de quo queritur, ut scire possit an ei cōpetat exceptio & qualis, & si actio realis fuerit, oportet docere petentē quod sua intersit petere, ut infra de causis proprietatis plenius. Eodē modo oportebit querentē ostendere quod sua intersit conqueri, quia non sufficit alicui dicere quod aliquis disseysiverit eum de libero tenemento suo sic proponendo intensionē, nisi illam fundaverit aliqua ratione probabili, vel præsumptiva: ut si dicat quod talis disseysiverit eum de tali tenemento, quod ei descendit ex causa successionis, vel donationis, vel ex causa dotis, vel ex aliqua alia justa causa acquirendi, & unde fuit in seysina per tantum tempus, donec ipse (de quo queritur) eum inde injuste disseysivit, vel quod tenementum illud, qualemcunq; ingressum haberet, tenuit per tantum tempus quod sine judicio non debuit disseysiri. Quia cùm quis agit ut possessionem alicujus rei adipiscatur, docere debet de jure suo per quod probet illam rem ad se pertinere, alioquin succumbet, quamvis ad disseysitorē res illa non pertineat, ut C. de edendo L. qui accusare, & C. de rei vendicatione L. penulť,[1] & V. Q. V. C. I.[2] Itē qualiter cūq; in seysina esset & per qualecūq; tēpus sive per longū sive per modicū, nō

Cod. l. ii. t. i. § 4. Cod. l. iii. t. 32. § 28.

[1] "penult." This is the reading of most MSS., but Bracton has misdescribed the Law, unless he had a text before him, differing somewhat from the Florentine text of the Digest.

[2] "V. Q. V. C. I." The text, as it stands, from "quia cum quis" down to the letters which denote a reference to the Decretum Gratiani, is omitted in MS. Rawl. C. 159. The substance, however, of the text, as printed, is maintained in MS. Rawl. C. 160, but with a different arrangement. The letters which denote a reference to the Decretum

who said, I examined most diligently the cause, which I did not know. For he ought to interrogate the parties, as well of the plaintiff as of the defendant, of the plaintiff, that is the petitioner or the complainant concerning the right or the complaint, that it may be known by this means whether the recognition ought to proceed by way of an assise or of a jury. In the first place concerning what tenement. Likewise he ought to interrogate him concerning whom the complaint is made, that he may know whether he is entitled to an exception, and to what kind of exception, and if the action be about realty, he ought to inform the claimant, that it is his interest to claim, as below concerning causes of property. In the same way he ought to inform the complainant that it is his interest to complain, for it is not sufficient for any one to say that a certain person has disseysed him from his free tenement, thus propounding his demand, unless he has founded it upon some reason, probable or presumptive; as if he shall say that a certain person has disseysed him from a certain tenement, which has come to him by succession or by donation, or by way of dower, or by some just way of acquisition, and whereof he was in seysine for so long a time, until he, of whom he complains, disseysed him of it unjustly, or that he had held that tenement, in whatever way he entered upon it, for so long a time that he ought not to have been disseysed without a judgment. For when a person proceeds, that he may obtain possession of a thing, he ought to explain his right by which he can prove the thing to be his, otherwise he will succumb, although it may not belong to the disseysor, as in the Code "de edendo," the Law "qui accusare," and the Code "de rei vendicatione" the last Law but one, and the Decretum of Gratian, question V., canon V., and cause I. Likewise in whatever manner he should have been in seysine, and for whatever time, whether for a

pertinet ad illum querentē disseysire, cùm nullum jus haberet nec juris scintillam ejiciendi, nec aliquam
f. 184. actionem in causa proprietatis. Et proposita sic querela & fundata, tunc demùm descendendum erit ad recognitionē, ut sciri possit utrum verū sit quod proponitur vel non. Quia qualitercunq; quis fuerit in seysina sive per disseysinā sive per intrusionē, & sic non nomine alieno sed proprio, licèt revera nihil juris habeat quantū ad verum dominū: habet tamen statim & sine intervallo liberum tenementū quantùm ad omnes qui sunt extra possessionē, qui nihil juris habent [in tenemento, ut infra de eodem. Igitur si ita nudè & in superficie procedatur (sicut quidam faciunt qui dicunt, statim audito brevi, si ille de quo queritur aliquid sciat dicere contra assisam) indiscretè agitur, quasi querela manente indiscussa; quia nescitur adhuc utrū cōpetat assisa vel jurata, nec etiam scitur utrum ibi sit transgressio vel disseysina. Igitur sicut necesse est quòd petens doceat in causa proprietatis, quo jure petat, cùm non sufficiat per se dicere quòd jus habeat in re nisi doceat de jure, ita non sufficit proponere querelā, nisi querens doceat jus querelæ, & quo jure ad ipsum pertineat.

2. Item de interrogationibus faciendis.

Et ideo ut res certa in judicium deducatur, & certi reddantur justiciarii & instruantur juratores, oportebit justitiarios interrogationes facere ad cautelam, s. inprimis de quo tenemento querens fuerit disseysitus. Item de qualitate, utrū s. de terra vel de redditu, & si de terra inquirendū est utrū propria fuit vel

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signify, "Quinta quæstio quinti "canonis. Prima causa," being the peculiar mode of citing the second part of the Decretum Gratiani.

long or a moderate time, it does not pertain to him to disseyse the claimant, since he would have no right nor a spark of right to eject, nor any right of action in a cause of proprietorship. And so the complaint having been propounded and founded, then we must descend to a recognition, so that it may be known whether that be true which is propounded or not. Because in whatever way a person may be in seysine, whether by a disseysine or by an intrusion, and so not in another person's name, but in his own name, although in truth he may have no right as regards the true ownership: he has however immediately and without an interval a free tenement as far as regards all persons, who are out of possession, who have no right in the tenement, as below on the same subject. Therefore if it be proceeded with thus nakedly and superficially, (as some do, who say, immediately upon the writ having been read, if he, against whom the complaint has been made, has any thing to say against the assise,) the proceedings are indiscreet, the complaint remaining as it were undiscussed; because it is not known as yet whether an assise or a jury is applicable, nor is it known whether there has been a trespass or a disseysine. Therefore as it is necessary, that the plaintiff should show in a cause of proprietorship, under what right he claims, because it is not sufficient to say by itself that he has a right in the thing, unless he explains the right: so it is not sufficient to propound a complaint, unless the complainant explains the right of his complaint, and by what right the thing belongs to him. f. 184.

2. Likewise concerning putting interrogatories.

And therefore that a thing certain may be brought into judgment, and the justices be rendered certain and the jurors be instructed, it is requisite that the justices should administer interrogatories for greater caution, to wit, in the first place, from what tenement the complainant has been disseysed. Likewise concerning its quality, whether it be land or rent, and if from land, it is to be inquired whether from his own or from common land.

cōmunis. Itē utrum publica res vel res sacra. Item si terra sive tenementū sit hæreditas descendens vel perquisitū ex aliqua justa causa acquisitionis. Item in feodo, vel ad vitā quocunq; modo, vel donec sit provisum, ita qd ad min^{9} præsumi possit qd. possit esse suum liberum tenementum, & quamvis alienum, qd. tempus sufficiat qd. sine judicio ejici non deberet. Et ideo de tempore seysinæ quærendū est, quicunq; fuerit in seysina, & sine judicio disseysitus, ut frater postnat^{9} vel antenat^{9}, vel bastard^{9}, vel etiam omnino extraneus. Si autem reddit^{9} sit, tunc inquirere oportet si reddit^{9} ille sit, qui domino feoffatori debeatur, vel reddit^{9} qui concedatur de aliquo tenemento annuatim percipiend^{9}, & ut[1] tenementi feoffato. Item utrum sit de camera tantum percipiendus ad vitam, vel in feodo de hæredib^{9}, sine aliquo tenemento, de quo debeat provenire. Item si sine tenemento, & de camera & in feodo vel ad vitam, si detur pro aliquo tenemento vel pro aliquo jure habendo, vel libertate in fundo alieno. Item inquirere oportet de quantitate tenementi, utrum sit ibi plus vel minus, ut sciri possit si plus querens posuerit in visu suo, quàm recuperare debeat per assisam, & ut sciri possit utrum recuperare debeat per assisam totum vel partem, vel omnino nihil. Item ne querens plus usurpet in seysina quàm recuperavit per assisam, quod si fecerit & inde fiat querela, declarabitur postmodum per assisam. Item inquirendum est, utrum omninò ejectus fuerit, vel quo minus uti possit seysina sua, vel quòd alius uti velit contra voluntatem suam, & sic de qualitate disseysinæ. Item inquirendum est de modo, scilicet utrum facta fuerit disseysina de nocte vel de

[1] "et ut." The particle "et" is omitted in MS. Rawl. C. 160.

Likewise whether the thing is public or consecrated. Likewise whether the land or tenement is an inheritance by descent, or has been obtained by some just cause of acquisition. Likewise whether in fee or for life in some manner, or until it has been provided for, so that at least it may be presumed that it may be his freehold, and although another's, that time may suffice that he cannot be ejected without a judgment. And for that reason inquiry is to be made concerning the time of seysine, whoever may have been in seysine and has been disseysed without a judgment, as a later-born brother, or an earlier-born, or a bastard, or even altogether a stranger. But if it be rent, then inquiry is to be made whether it is rent which is due to a lord as feoffor, or rent which is granted from some freehold to be received annually, and as by the feoffee of the tenement. Likewise whether it is only to be received from a chamber for life, or in fee from the heirs, without any tenement from which it can arise. Likewise if without a tenement, and from a chamber, and in fee and for life, if it be given for any tenement or for enjoying any right, or a liberty in some other person's ground. Likewise it will be requisite to inquire concerning the quantity of the tenement, whether there be there more or less, that it may be known whether the plaintiff has put more in his view than he ought to recover by the assise, and that it may be known whether he ought to recover by the assise the whole or a part, or nothing at all. Likewise lest the plaintiff should usurp more in his seysine than he recovered by the assise, which if he shall have done and there should be a complaint thereof, it shall be afterwards declared by the assise. Likewise it is to be inquired, whether he has been altogether ejected, or prevented from using his seysine, or that another wishes to use it against his will, and thus concerning the quality of the disseysine. Likewise concerning the manner, whether the disseysine was made by day or by night, whether with arms or

die, utrum cum armis vel sine. Item utrum cum roberia, vel sine, & sic de singulis circumstantiis. Item inquirendum est, quamvis querens justum non habeat initium, ut super disseysinam vel intrusionem, vel per
f. 184 b. donationem factam à non domino de re aliena, per quantum tempus possederit, per longum vel per breve, & quis eum ejecerit: extraneus qui jus non habuit omnino, vel verus dominus vel feoffator suus, & hoc propter commodum possessoris, cùm ille qui possidet, licèt jus non habeat, meliorem habeat conditionem, eo quòd in possessione est, quàm ille qui nihil juris habet & est extra possessionem: quia talis, qui ita est in possessione, statim habet liberum tenementum erga feoffatorem suum & extraneas personas, sine aliquo temporis intervallo, contra verum dominum non, sine temporis intervallo, quod sufficere possit pro titulo, ita quòd possidens ejici non possit sine judicio. Item talibus non competit aliqua exceptio contra assisam, nec de tenera seysina, nec de libero tenemento. Feoffatori de re aliena non competit propter factum suum, extraneo verò non, quia nullum jus habuit. Vero domino non propter tempus, quia post tempus disseysivit sine judicio. Quibus de causis etiam proximè prænotatis, inquirendum erit à disseysitore, cùm taliter possidens absque justo initio injustè & sine judicio, vel licet non injustè per se, tamen injustè, quia sine judicio disseysitus fuerit, qualem ingressum ille de quo queritur habuit in illud tenementum, ut videri possit utrum ei competat exceptio vel non, & si querens nihil docere possit, quòd habeat liberum tenementum, vel quod injustè dejiciatur, tamen oportet quòd ille de quo queritur doceat contrarium, scilicet quòd justè

without. Likewise whether with robbery or without, and so concerning the several circumstances. Likewise it is to be inquired, although the plaintiff may not have a just commencement, as upon a disseysine or an intrusion or a donation from one who was not the owner f. 184 b.
of another person's property, for how long a time he has possessed it, for a long or for a short time, and who has ejected him; a stranger, who had no right at all, or the true lord, or his feoffor, and this for the advantage of the possessor, since he who possesses, although he may have no right, is in a better condition from the fact that he is in possession, than he who has no right and is without the possession of the thing; because such a person who is so in possession has a freehold as regards his feoffor and strange persons without any interval of time, but as regards the true owner not so without an interval of time, which may suffice for a title, so that the possessor may not be ejected without a judgment. Likewise such persons are not entitled to make any exception to an assise, neither concerning the tender seysine, nor concerning the freehold. The feoffor is not entitled concerning another person's property on account of his own act, but a stranger not at all, because he had no right. The true lord not on account of the time, because after the time he has disseysed without a judgment. For which causes immediately above noted it will have to be inquired from the disseysor, when possessing in such manner without a just commencement unjustly and without a judgment, or although not unjustly in itself, but unjustly because without a judgment he has been disseysed, what entry he about whom the complaint is made had into the freehold, that it may be seen whether he is entitled to an exception or not; and if the complainant can give no evidence that he has the freehold, or that he is unjustly ejected, nevertheless it is requisite that he concerning whom the complaint is made should show the contrary, to wit, that he has put

posuerit se in seysinam, & non injustè, scilicet vel cum justo judicio, vel alio modo incidenti[1] in causis prænotatis. Item si dicat tenens quòd justè & de voluntate querentis, hoc non sufficit, quia primo potest de voluntate intrare, sed postmodum injustè & contra voluntatem se in seysina tenere multis modis, sicut per vim ut contra conventionem.[2]

Cap. XIX.

1. Factis interrogationibus a justiciariis a querente, inquirendum erit a tenente si aliquid sciat dicere quare assisa debeat remanere, et de captione assisæ.

Factis igitur interrogationibus, ut prædictum est, quod non est fatuum nec præsumptuosum, tunc primo quæratur a tenente si aliquid velit vel sciat dicere, quare assisa debeat remanere. Ex interrogationibus vero præcedentibus dabitur ei materia respondendi; sunt tamen qui interrogant à tenente si aliquid sciat dicere contra assisam, quod non est in primis quærendum, sic ut paulò ante dictum est. Et cùm ita inquisitum fuerit, fortè non vult vel nescit aliquid dicere quare assisa debeat remanere, sed statim negando quod disseysinam non fecerit se ponit simpliciter in assisam, & sic procedit assisa in modum assisæ, & tunc procedatur ad assisam capiendam si juratores præsentes sint, omnes vel pro majori parte, usque ad septem ad f. 185. minus, contra quos excipi non poterit. Si autem præsentes non fuerint, differatur assisa usque ad alium diem, ut tunc veniant & procedat assisa.

2. Exceptio contra juratores.

Cum autem venerint excipi possit contra juratores multis modis. Eisdem enim modis amoveri possunt a sacramento, quibus etiam testes amoventur a testimonio. Repellitur autem a sacramento infamis scilicet

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[1] "incontinenti," MS. Rawl. C. 159.

[2] "Item si dicat," down to "conventionem," omitted MS. Rawl. C. 159.

himself justly into seysine and not unjustly, to wit, with a just judgment, or in some other manner incidental amongst the causes above noted. Likewise if the defendant says that he holds justly and with the consent of the plaintiff, this is not sufficient, because a person may enter at first with consent, and afterwards keep himself in seysine in many ways unjustly and against the will of the plaintiff, as by force or against an agreement.

Chapter XIX.

Interrogatories having been administered as aforesaid, that it is not fatuous nor presumptuous, then for the first time inquiry is to be made of the defendant, if he wishes or knows to say anything, why the assise should be stayed. But from the preceding interrogatories he will have materials for his answer: there are some, however, who interrogate the defendant if he knows to say anything against the assise, which is not to be inquired of in the first place, as stated shortly above. And when inquiry has been so made, by chance he does not wish or he does not know to say anything against the assise why it ought to be stayed, but forthwith by denying that he has made a disseysine he puts himself simply on the assise, and so the assise proceeds in the manner of an assise, and then let them proceed to hold the assise, if the jurors are present, all or the greater part, as many as seven at least, against whom no exception can be made. But if they be not present, let the assise be deferred to another day, that they may then come and the assise may proceed. f. 185.

1. The interrogatories having been put by the justiciaries to the plaintiff, inquiry will have to be made of the defendant, if he knows anything wherefore the assise ought to be stayed, and concerning the holding of the assise.

But when they have come, exception may be taken in many ways against the jurors. For they can be repelled from taking the oath, in the same way as witnesses from giving testimony. But an infamous person is repelled

2. An exception against the jurors.

qui aliâs convictus fuerit de perjurio, quia legem amittit, & ideo dicitur quod non est ulterius dignus lege, quod Anglicè dicitur, He ne es othes worthe that es enes gylty of oth broken. Item repellitur quis a sacramento propter inimicitiam magnam & non levem, præsentem & non illam quæ aliquando fuit, & non modo cum producitur. Item repellitur quis propter amicitiam præsentem, sicut propter odium. Item repellitur, si quid juris clamaverit in re de qua jurare debet. Item repellitur servus a sacramento juratorum, & hoc simplici verbo protestantium, si fuerit in possessione servitutis. Item repellitur propter nimiam familiaritatem, & non levem. Item propter consanguinitatem & affinitatem præsentem, quia fere paribus passibus incedunt, & hoc nisi eadem familiaritate vel cõsimili conjunctus sit alteri parti. Idem verò dici poterit supra de amicitia, familiaritate, & inimicitia. Item repellitur, si fuerit cum eo ꝑ quo jurare debet cõmensalis, vel de ejus familia. Item si sit ita sub ejus potestate, quod sibi possit imperari, vel noceri, vel hujusmodi, ut si in domigerio[1] vel ita sub ejus manu, quod possit per eum in aliquo gravari, vel ratione sectarũ, servitiorum vel cõsuetudinum. Item si jurator, vel aliqua partium sint in eadẽ causa vel consimili. Item repellitur si fuerit cõsiliarius alicujus partis, vel advocatus. Item notandum, quod cause suspicionum quandoq̃ præsentes sunt, quandoq̃ preterite, & ea quæ fuit & non est, locum nõ habet. Quia præsens causa debet allegari & probari, preterita autem non; quia quæ fuit non est, & ideo locum non habet, nec probari debet. Item causa non sufficit

[1] "dang'io," being a contraction for "dangerio," is the reading of MSS. Rawl. C. 160 and 159; "dan-"gerio" in the extended form is the reading of the Godbold MS., also of MS. Crewe. The word "domigerio" is probably an erroneous extension, which has been accepted by Ducange and other lexicographers, who had not the means of testing it by reference to original MSS. See Introduction.

from taking the oath, to wit, a person who has been convicted of perjury, because he has lost his law, and for that reason it is said that he is no longer law-worthy, as is said in English. "He ne es othes worthe that es "enes gylty of oth broken." Likewise a person is repelled from taking the oath on account of a great and not a light enmity, present and not one which was some time ago, and not recently when he is produced. Likewise a person is repelled on account of present friendship, as on account of hatred. Likewise he is repelled who has made any claim of right in the thing concerning which he ought to swear. Likewise a serf is repelled from the oath of the jurors, and this upon the simple word of the protestors, if he is in possession of a servitude. Likewise he is repelled on account of a close and not a slight intimacy. Likewise on account of consanguinity and present affinity, because they walk almost in the same steps, and this unless he is connected with the other party by the same tie of consanguinity or affinity. The same may be said above concerning friendship, intimacy, and enmity. Likewise he is repelled, if he be accustomed to take his meals with him for whom he ought to swear, or is of his family. Likewise if he be so under his power, that he may be controlled or hurt or such like, as if he be in his household or so under his hand that he can be aggrieved in any way in regard of suits, services, or customs. Likewise if a juror or any of the parties be in the same cause or a similar one. Likewise he is repelled, if he is the counsel of either party or the advocate. Likewise it is to be noted, that the causes of suspicion are sometimes present, and sometimes past, and that which has been and is not, has no place. Because a present cause ought to be alleged and proved, but not a past cause, because that which has been, is not, and for that reason it has no place, nor ought it to be approved. Likewise a cause is not suffi-

quæ dudum fuerat, nisi præsens fuerit vel recens, scilicet ante hesternum diē vel nudiûs tertiûs jurator & aliqua partiū inimici erant, & licet modo non sunt, tamen ista causa recusationis probabilis est propter recentiā. Plures autē alię sunt cause recusandi juratores, de quibus ad presens non recolo, sed, que jam enumerate sunt, sufficiant exempli causa. Et sciendum, quod si semel de cōsensu partium eligantur, ulteriùs recusari non possunt, nisi ex nova & recenti causa superveniente.

3. De forma sacramenti in assisa novæ disseysinæ.

Cum autem partes in juratores consenserint, tunc procedit assisa, & statim jurare debent in hac forma, & primus per hæc verba. Hoc auditis justiciarii, quod veritatē dicā de assisa ista, & de tenemēto de quo visum feci p ꝑceptum domini regis, vel sic: de tenemento unde talis redditus ꝑvenit. Item si fuerit cōmunia pasturæ tunc sic: de pastura & tenemento vel tenementis unde visum feci. Item si aliquid fiat ad nocumentū in fundo unius quod noceat fundo alterius, ut si murus leveť, tunc dicatur primò de eo quod nocet, & postea de tenemento cui nocitum est, sic: de muro & tenem̃to vel hujusmodi unde visū feci, &c. Et ita generaliter de omnibus, ratione quorū capiunť assise principaliter, & tunc: & ꝑ nihilo omittā, quin veritatem dicā, sic me Deus adjuvet & hec sancta. f. 185 b. Et postea omnes alii juratores jurabunt per ordinem, quilibet ꝑ se & hoc modo, Tale sacram̃tum quale ille talis primus hic juravit, tenebo ex parte mea, sic me Deus adjuvet & hec sancta, &c. Et notandum ꝙ possunt plures assisæ capi sub uno & eodem sacram̃to,

cient, which is of long standing, unless it be present or recent, as for instance, if a juror and one of the parties were enemies before yesterday, or the day before yesterday, and although they are now not so, nevertheless such a cause of refusal is probable on account of its recent character. But there are several other causes of refusing jurors, concerning which I do not at present recollect, but which have been sufficiently enumerated for example's sake. And it is to be known that if once they be chosen with the consent of the parties, they cannot be refused on account of some new and supervening cause.

3. Of the form of oath in an assise of novel disseysine.

But when the parties have consented to the jurors, then let the assise proceed, and they ought immediately to swear in this form, and the first in these words: Hear this, ye justices, that I will declare the truth of this assise, and of the tenement of which I have made a view under the precept of the lord the king; or thus, of the tenement from which the said rent proceeds. Likewise if it be a common right of pasture, then thus: Concerning the pasture and the tenement or tenements whereof I have made a view. Likewise if anything be done as a nuisance on the ground of one person, that is a nuisance to the ground of another, as if a wall be raised; then let it be explained first concerning the thing which is the nuisance, and afterwards concerning the tenement to which the nuisance is worked, thus: Concerning the wall and the tenement and such like whereof I have made a view, &c. And so generally concerning all things, in regard of which assises are held principally, and then: "and I will for nothing omit to "say the truth, so may God me help and these hallowed "things." And afterwards let all the other jurors swear f. 185 b. in order, each by himself, and in this manner: "Such "oath as he our said foreman has sworn, I will keep on "my part, so help me God and these hallowed things," &c. And it is to be noted that several assises may be

sicut plures nove disseysine de tenemto, et tunc sic, s. q veritatem dicā de assisis istis & tenementis, de quibus visum feci. Item de assisis istis & tenementis, et similiter de tenemento unde talis redditus pvenit. Item si cōmunia pasturæ adjungatur, tunc sic: de talibus tenementis, & cōmunia pasturæ, & tenemento, de quibus visum feci, &c. Item si nocumtum adjungatur, tunc repetitis omnibus ut supra, dicatur: de fossato, muro, vel haya, & hujusmodi, et de tenemtis, unde visum feci, &c. Et sic fiat de omnibus aliis assisis, sicut ultime præsentationis, mortis antecessoris, et aliis. Item sicut plures disseysine terminari possunt p unā juratam vel p plures, ita possunt plures disseysine surgere ex uno facto, & terminari p unam assisam vel p plures, ut infra. Facto autem sacramto, ut predictum est, tunc legat prothonotarius virtutē brvis ad instructionem juratoř, hoc modo: Vos dicetis p sacramtum q fecistis, si talis N. injustè et sine judicio disseysivit talem N. de libero tenemto suo in tali villa post ultimum reditum regis H. &c. vel non. Nihil autem dicent justiciarii in hoc casu ad instructionem juratoř, quia nihil dicitur vel excipitur ab initio cōtra assisam. Facto autem sic sacramto, recedāt juratores in aliquē locū secretum, et habeant ad invicem inter se colloquium de hoc q eis injungitur faciendum, ad quos etiam nullus habeat accessum nec cum eis colloquium, donec suum dixerunt veredictum, nec ipsi signo vel verbo alicui manifestent quod fuerit ab eis dicendum.

4. Si juratores sunt sibi invicem contrarii.

Contingit etiam multotiens q juratores in veritate dicenda sunt sibi contrarii, ita quod in unam declinare non possunt sententiam. Quo casu, de consilio curiæ

held under one and the same oath, just as several novel disseysines concerning a tenement, and then thus: to wit, that I will speak the truth concerning those assises and tenements, and in like manner concerning the tenement, from which the said rent is derived. Likewise if a common right of pasture is adjunct, then thus: concerning the said tenements and the common right of pasture and the tenement, of which I have made a view, &c. Likewise if a nuisance be adjunct, then, after repeating all as above said, let it be said: concerning the foss, wall, or hedge, and such like, and concerning the tenements of which I have made a view, &c. And so let it be done in all assises, as of last presentation, of the death of an ancestor, and others. Likewise as several disseysines may be terminated by one jury or by several, so may several disseysines arise out of one act and be terminated by one assise or by several, as below. The oath then having been taken, as aforesaid, then let the chief notary read the substance of the writ for the instruction of the jurors, in this manner: Ye shall declare by the oath which you have made, if the said N. has unjustly and without a judgment disseysed the said N. of his free tenement in such a vill since the last return of king Henry, &c., or not. But the justices shall say nothing in this case for the instruction of the jurors, because nothing is said nor excepted from the commencement against the assise. But when the oath has thus been made, let the jurors retire into some separate place, and have a conference amongst themselves concerning the matter which they have been enjoined to execute, to whom let no one have access nor have conversation with them, until they have declared their verdict, nor let them by sign or word manifest to any one what is about to be said by them.

4. If the jurors are in disagreement

It happens also on many occasions that the jurors in saying the truth are contrary to one another, so that they cannot decline into one opinion. In which case

Glanville, l. ii. c. 17.

affortietur assisa, ita q apponantur alii juxta numerum majoris partis quę dissenserit, vel saltem quatuor vel sex, et adjungantur aliis, vel etiam p seipsos sine aliis de veritate discutiāt & judicent, et p se respondeāt, et eorum veredictum allocabitur, et tenebit cum quibus ipsi convenerint; sed alii ppter hoc non erunt convicti, sed quasi p transgressione amerciādi, quia adhuc bene poterit esse q ipsi veritatem dixerint, et alii mendacium, quia adhuc convinci poterunt de perjurio. Cum autē post sacramentum suum dixerint veredictum suum sive p una parte sive p alia, secundùm eorum dictum proferetur judicium, nisi aliquid dixerint obscurum, propter quod justiciarii inducantur ad examinandum, & vel adjudicabitur seysina querenti, vel ipse tenens quietùs recedat cum seysina sua: et aliquando contingit quod utraque pars in misericordia remanebit, vel una tantum. Et eodem modo plures nominati disseysitores quidam cadunt in pœnam disseysinæ, et quidam quieti recedent. Et si pro tenente dixerint, querens tantum in misericordia & non plegii, quia prosecutus est, licet judicium habuerit contrarium. Possunt etiam recognitores totam rei veritatem brevibus & paucis verbis justiciariis exponere, si omnia plana sunt & apta, & nihil in obscuro. Sed si talis oriatur dubitatio vel obscuritas, quod solutio difficilis existat, tunc cogantur, ea quæ obscura sunt manifestiùs & apertiùs declarare, si hoc eis sit possibile, & justiciarii secundùm dicta eorum procedunt[1] ad judicium. Sed si illud obscurum vel dubium declarare non possunt aliquo modo, s. nec ipsi recognitores, nec alii qui fuerint ad hoc vocati p afforciamento, tunc

f. 186.

[1] "procedant." MS. Rawl. C. 160.

with the advice of the court the assise may be strengthened, so that others may be added according to the number of the greater part which has dissented, or at least four or six, and let them be adjoined to the others, or even let them by themselves without the others discuss and judge respecting the truth, and let them answer by themselves, and their verdict shall be allowed and shall hold good with those with whom they agree; and the others shall not be convicted for this reason, but shall be amerced as if for a trespass, for it may still be the fact that they have spoken the truth and the others a falsehood, who may still be convicted of perjury. But when after their oath they have given their verdict either for one party or for the other, according to their declaration let judgment be pronounced, unless they have said something obscure, on account of which the justices may be led to examine, and either the seysine shall be adjudged to the plaintiff, or the defendant shall withdraw acquitted with his seysine: and sometimes it happens that each party will remain at mercy, or one only. And in the same way several disseysors by name, some fall under the penalty of disseysine, and some shall retire acquitted. And if they have spoken for the defendant, the plaintiff only is at mercy, and not his sureties, because he has prosecuted, although he has had an adverse judgment. The recognisors also may expound the whole truth of the business in short and few words to the justices, if all things are plain and fitted, and nothing is obscure. But if such doubtfulness or obscurity arises, that the solution is difficult, then let them be compelled to declare more clearly and more openly those things which are obscure, if this is possible for them, and the justices according to their declaration proceed to judgment. But if they cannot clear up that obscurity or doubtfulness in any manner, to wit, neither the recognisors themselves nor the others who have been called to reinforce them, then it will be safer that the

with one another.

f. 186.

tutius erit q̄ partes inducantur ad concordiam, si fieri possit, vel ponatur judicium usque ad magnam curiam, & ibi de consilio curiæ terminetur negotium. Si autem omnia plana sunt quæ in recordo continentur, tunc secundùm eorum dicta erit procedendum, & si bene juraverint, stabitur eorum veredicto; si autem malè, locus erit cōvictioni: si autem obscura dixerint & dubia, ubi unica oratio duplicem habere possit intellectū, vel si partes minus plenè fuerint exāinatæ,[1] locus erit certificationi, ut infra dicetur.

5. De veredicto juratorum.

Videndū erit igitur utrū certum dixerint vel incert̄, clarū vel obscurum, vel utrū dubitaverīt in veredicto suo, vel omnino ignoraverint. Item utrum dixerint aliquid cōtra p̄sonā querentis, quare assisam portare non possit, vel contra p̄sonam tenentis, quare contra assisam excipere non possit, vel quòd dicant q̄ p̄pter errorem in brevi stare non possit, vel respondent secundùm ea quæ eis injunguntur, & que pertinent ad assisam tantum. Si autem certum dixerint de iis quæ p̄tinent ad assisam, & non contra b̄re, tunc aut verum, aut falsum. Si verum, stabit̄ eorum veredicto, nec erit timenda convictio. Si autē falsum, tūc aut scienter aut ignoranter: si scienter, cōmitunt p̄jurium, si autem ignoranter, ut si fuerint aliquo justo errore ducti, de gratia excusantur. Si autem incertum dixerint, judex examinare debet, ut de incerto faciat certum, de obscuro clarum, de dubio verum: alioquin anceps & periculosum erit sacramentum, & inde sequi poterit fatuum judicium. Si autem juratores omninò factum ignoraverint, & nihil de veritate sciverint, ad-

[1] "examinati." MS. Rawl. C. 160.

parties be induced to agree, if it be possible, or let the judgment be referred to the high court, and there let the business be determined with the advice of the court. But if all things are plain which are contained in the record, then proceedings are to be had according to their declarations, and if they have well sworn, their verdict shall be binding; but if ill, there will be place for a conviction; but if they have spoken obscurely and dubiously, where a single speech may have a double meaning, or if the parties have been not fully examined, there will be place for a certificate, as will be explained below.

5. Concerning the verdict of the jurors.

It will therefore have to be seen, whether they have spoken with certainty or with uncertainty, with clearness or with obscurity, or whether they have been doubtful in their verdict, or have been altogether ignorant. Likewise whether they have said anything against the person of the plaintiff, why he may not bring an assise, or against the person of the defendant, why he may not except against an assise, either because they say that on account of an error in the writ it cannot stand, or they answer according to those things, which are enjoined to them, and which pertain to the assise only. But if they have spoken with certainty concerning those things which pertain to the assise, and not against the writ, then it is either true or false. If true, their verdict must stand, nor will a conviction have to be feared. But if false, then either knowingly or ignorantly: if knowingly, they commit perjury; but if ignorantly, as if they have been led by any just mistake, they are excused of grace. But if they have spoken with uncertainty, the judge ought to examine, that he may make it certain out of what is uncertain, clear out of what is obscure, true out of what is doubtful, otherwise their oath will be doubtful and perilous, and hence might follow a fatuous judgment. But if the jurors are altogether ignorant about the fact, and know nothing concerning the truth, let there be associated with them others who

junganť eis alii, qui sciverint veritatem. Si autem nec adhuc sciri possit veritas, tunc dicere oportebit de credulitate & de conscientia ad minus. Et in quo casu non committunt perjurium, quia contra conscientiam non vadunt, ut infra pleniùs dicetur de convictionibus. Locus erit certificationi si minus plenè fuerint examinati, vel si minus plenè responsum sit ad interrogata, ita q̃ obscura dixerint, vel ambigua, vel justo errore decepti fuerint. Item si contra p̃sonam querentis dixerint, quare non competit ei assisa, vel contra p̃sonam tenentis, q̃ excipere non possit; si falsò hoc dixerint, committunt perjurium, & incidunt in convictionem, quia capitur assisa in modū assisæ, quod quidem non esset, si caperetur ut jurata; ut si hujusmodi exceptio, scilicet causa, status, vel conventio, vel conditio, vel hujusmodi à parte parti opponeretur, & utraque pars de hoc se sponte poneret in juratam, cum aliam fortè non haberent probationem. Item si dicant juratores, quod breve ineptè conceptum est, quia erratum est forte in comitatibus, & villarum nominibus, & nominibus personarum, vel cognominibus, vel etiam nominibus dignitatum, vel hujusmodi: non erit de hoc multò curandum, quia hoc ab initio non fuit à tenente excipiendo objectum. De nominibus verò comitatuum & villarum non refert, dum tamen de loco constiterit, nec etiam de nominibus personarum, dum tamen con-
f. 186 b. stiterit de personis. Et quia tenens ab initio (si vellet) excipere posset contra breve & non excepit, ex quo se statim in assisam posuit errorem dissimulans breve tanquā validum approbavit, & etiā quamvis ju-

know the truth. But if even thus the truth cannot be known, then it will be requisite to speak from belief and conscience at least. And in which case they do not commit perjury, unless they go against their conscience, as will be explained more fully in treating of convictions. There will be place for a certificate, if they have been scantily examined, or have scantily answered to the interrogatories, so that they have spoken obscurely or ambiguously, or have been deceived by a just error. Likewise if they have spoken against the person of the plaintiff, wherefore he is not entitled to an assise, or against the person of the defendant, that he cannot except: if they have said this falsely, they commit perjury and fall under conviction, because the assise is held after the manner of an assise, which would not be the case if it were held after the manner of a jury; as if an exception of this kind, to wit, a cause, state, or convention, or condition, or such like should be raised by one party against the other party, and both parties should place themselves of their own accord on this subject upon a jury, when they have perhaps no other proof. Likewise if the jurors should say that the writ has been wrongly drawn, because there has been an error perhaps in the counties and in the names of the vills, and the names of the persons, or the surnames, or in the names of dignity or such like; there will not be much importance in this, because this objection has not been taken by the defendant by way of exception. Concerning, however, the names of the counties and the vills, it does not much matter, provided it is clear respecting the place, nor even concerning the names of the persons, provided it is clear respecting the persons. And because f. 186 b.
the defendant might have excepted at the commencement (if he wished), against the writ, and he has not excepted, from the time when he forthwith put himself on the assise dissembling the error, he has approved the writ as if it were valid, and even although the jurors

ratores in hac parte erraverint, perjurium non cōmittunt, cum non consentiant falsitati, quia ille qui errat non consentit. Itē sicut ad justiciarium ptinet diligentissima examinatio, ita pertinet ad eum justa sententiæ prolatio: sed ante judicium examinare debet factum & dicta juratorum, ut securè possit procedere ad judicium.

6. Quod sacramentum habet in se tres comites.

Et cum sacramentum habeat in se tres comites, veritatem s., justitiam, & judicium, veritas habenda est in juratore, justitia & judicium in judice. Videtur tamen, quod aliquando pertinet judicium ad juratores, cum super sacramentum suum dicere debent (dum tamen, secundùm conscientiam) si talis disseysiverit talem vel non disseysiverit, & secundū hoc reddatur judicium. Sed cum ad judicem pertineat justum proferre judiciū & reddere, opportebit eum diligenter deliberare & examinare si dicta juratorum in se veritatē contineant, & si eorum justū sit judicium vel fatuum, ne si contingat eum judicē eorum dicta sequi, & eorum judicium, ita falsum faciat judiciū vel fatuū: est enim falsum judiciū & fatuum, ut sic esse possit falsum judicium vel fatuū, ut infra plenius dicetur de convictionibus.

7. Quæ debent restitui disseysito.

Item cum superius dicatur quod vicecomes faciat tenemētum reseysiri de catallis, &c. & tenemētū esse in pace, illud hodiè non observatur, sed loco illius clausulæ, debet judex diligenter providere, quod omnia dāna restituātur disseysito, cum constiterit justiciariis per sacramentum juratorum disseysinā esse factam. Et ita diligens[1] debet esse in hac parte quod omnia damna restituantur cum ipsa re, ne disseysitoribus

[1] "Et ita diligens" down to "et percipiendis," omitted in MS. Rawl. C. 160.

may have erred in this part, they do not commit perjury, since they are not consenting to a falsehood, because he who errs, does not consent. Likewise as a most diligent examination belongs to the justiciary, so a just delivery of a sentence pertains to him; but he ought before the judgment to examine the fact and the declarations of the jurors, that he may proceed securely to judgment.

6. That the oath has in itself three companions.

And since the oath has in itself three companions, truth, to wit, justice, and judgment, truth is to be found in the jurors, justice and judgment in the judge. It seems, however, that sometimes judgment pertains to the jurors, when they ought to say upon their oath (provided, however, according to their conscience), if such an one has disseysed such an one, or has not disseysed him, and according to this let judgment be rendered. But since it belongs to the judge to pronounce and to render a just judgment, it will behove him diligently to deliberate and examine, if the declarations of the jurors contain in themselves the truth, and if their judgment has been just or fatuous, lest it should happen that if he as judge should follow their declarations and their judgment, he should make a false or a fatuous judgment: for it is a false and fatuous judgment, that it might be so a false or fatuous judgment, as will be explained more fully below in treating of convictions.

7. What ought to be restored to the disseysee.

But what has been said above that the viscount ought to cause the tenement to be reseysed of its chattels, &c., and the tenement to be in peace, that is not observed in the present day, but in the place of that clause, the judge ought diligently to provide, that all his losses should be made good to the disseysee, when it has been made clear to the justiciaries by the oath of the jurors that a disseysine has been made. And he ought to be thus diligent in this part that all the damages be made good with the thing restored, lest to disseysors in

imposterum ex negligentia eorum detur voluntas vel materia delinquendi p disseysinā, & ne ex alieno damno lucrum reportant vel cōmodum. Videndum est igitur quid debeat restitui disseysito, & sciendum quod ipsa res cum fructibus omnibus medio tempore pceptis, s. a tempore disseysinæ usq̄ ad judicium perceptis & pcipiendis, quia quāvis quis disseysinam fecerit, catalla sua inventa & illata in tenemento[1] amittere non debet. Item quod tenementum esse debeat in pace non dicitur sine causa, quia ex quo vicecom̄ breve regis susceperit, non debet tenementū vel possessio ad alium transferri, nec injuria minui nec augeri, sed omnia in pace debent remanere usq̄ ad captionem assisæ, & hoc si omnino ejectus fuerit a tenemento. Si autem impeditus quo minus quiete & in pace uti possit, licet à tenemento omnino ejectus non fuerit, recuperabit principaliter pacem & quietem, & præterea secundariò omnia dāna, quæ sustinuerit p prædictum impedimentum. Item etiā etsi non omnino ejectus fuerit, tamen alius usus fuit in suo contra suā voluntatē, recuperabit libertatē & quietem, & excludet servitutem. Recuperabit etiam omnia damna quæ sustinuerit per predictum usum injustum.

8. De pœna disseysitoris multiplici.

Disseysitor autem p disseysina triplicem pœnam sustinebit, & aliquando quartam sustinere deberet. Prima enim talis est, quod erit in misericordia domini regis, pro qualitate & modo disseysinę pœnā habebit majorem vel minorem, ut si cum armis vel sine, & nunquam minor erit misericordia quàm reperiuntur damna. f. 187. Item pœnam habebit, quæ dici poterit quarta, propter pacem. Item si roberiam fecerit cum disseysina, pœnā

[1] " tenementum," MS. Rawl. C. 160.

future from the negligence of the justiciaries there should be given the will or the means of offence by a disseysine, and lest they may obtain for themselves gain or advantage from the damage of another. We must see, therefore, what ought to be restored to the disseysee, and it is to be known that the thing itself with all the fruits accruing from it in the mean time, that is, accruing or to accrue from it from the time of the disseysine to the judgment, because although a person has made a disseysine, he ought not to lose his chattels found there and brought into the tenement. Likewise that the tenement should be in peace is not said without cause, because from the time that the viscount received the king's writ, the tenement or possession ought not to be transferred to another person, nor to be diminished unjustly, nor to be increased, but all things ought to remain in peace until the holding of the assise, and this if he has been altogether ejected from the tenement. But if he has been hindered from using it in quiet and in peace, although he has not been altogether ejected from the tenement, he shall recover principally peace and quiet, and secondarily besides this all the damages which he has sustained from the aforesaid hinderance. Likewise, although he has not been altogether ejected, yet [if] there has been another use of his property against his will, he shall recover liberty and quiet, and shall exclude the service. He shall also recover all the damages which he has sustained from the aforesaid unjust use.

8. Of the manifold penalty of the disseysor.

But the disseysor shall undergo a triple penalty for the disseysine, and sometimes ought to undergo a fourth. For the first is of this nature, that he will be at the mercy of the lord the king, according to the quality and manner of the disseysine he will have a greater or a less penalty, as if he has done it with arms or without, and the amerciment will never be less than the losses have been found to be. Likewise he will have a penalty, which may be called the fourth on account of the peace. Like- f. 187.

habebit triplicatam, scilicet pro disseysina misericordiam, pro pace prisonam, pro roberia gravem redemptionem, vitam autem non amittet, nec membrum propter roberiā, cum criminaliter non agatur, nec procedatur versus eum p̄ appellum. Dabit etiā disseysitor vicecōiti p̄ disseysina unum bovem vel quinq̄ solidos, dum tamen principalis disseysitor extiterit. Illi vero qui in auxilio vel fortia, vel consilio extiterint, nullum dabunt, licet in quibusdā cōm̄ aliter fuerit observatum (principalis dico) secundum quod fuerit unus vel plures, &c. Item damna dabit p̄ sacramentum juratorum estimanda, & per justiciarios (si opus fuerit) taxanda, ad minorem quantitatē, si juratores fortè modū excesserint, ad plus autem estimari non debent a justiciariis quam juratores dixerint in sacramento, nisi fortè juratores illa dāna ex certa scientia ad minus taxaverunt quam deceret. Quod quidē non expedit, ut p̄dictum est, si disseysitor de damno alieno lucrum reportaret. Sunt enim multi magnates, & alii potentiores, qui p̄pter lucrum, quod inde consequi sperant, plures faciunt disseysinas, quas quidem aliâs non essent facturi, nisi propter lucrum: quia cum de exitibus terrarū & fructibus ex longo tempore magnā summā pecunię, & aliâs cōmodum aliud perceperint, credunt se posse evadere de misericordia per summā minimam, & ita lucri facere quod excedit, quia sæpius juratores, ex quo tenementum disseysitoribus auferunt, nolunt eos gravare per dāmna, ut sic utramq̄ partem reddant pacificam & pacificatam.

9. Qualiter justiciarii inquirere debent de damnis.

Ad talē igitur occasionem in jure tollendam, justiciarii non negligenter sed diligenter examinent & inquirāt, quę damna facta sint in domibus, gardinis,

wise if he has committed a robbery with the disseysine, he shall have a triple penalty, to wit, an amerciment for the disseysine, imprisonment for [the breach of] the peace, a heavy ransom for the robbery; but he shall not lose his life nor a limb for robbery, since the proceedings against him are not criminal, nor are they commenced by an accusation. The disseysor shall also give to the viscount for the disseysine an ox or five shillings, provided he is the principal disseysor. But those who have been assisting, or accessory, or advising, shall give nothing, although in some counties it is otherwise observed (I mean the principal disseysor) according as there are one or more, &c. Likewise he shall pay damages, to be estimated by the oath of the jurors, and to be taxed (if necessary) by the justices at a less quantity, if the jurors have by chance exceeded the proper measure, but they ought not to be estimated higher by the justices than the jurors have estimated them on their oath, unless the jurors by chance have estimated those damages from a certain knowledge at less than was proper. Which is not expedient, as aforesaid, if the disseysor should carry away gain by another's damage. For there are many magnates, and others more powerful, who on account of the gain which they thereby hope to make, cause many disseysines to be made, which they would otherwise not do, except for the sake of the gain, for when they have derived a large sum of money and otherwise great advantage from the produce and fruits of the land during a long interval of time, they believe that they can escape by an amerciment for a small sum, and so may make a profit of the excess, because oftentimes jurors, at the time when they take away the tenement from the disseysors, are unwilling to burden them with damages, that so they may render each party peaceable and pacified.

9. How the justices ought to

To remove therefore such an occasion for mal-administering justice, the justices shall not negligently but diligently examine and inquire what damages have been

boscis, & aliis, & quod vastum fecerint disseysitores, & quod exilium, & quā districtionem & qualiter, & pro quanto (cum hujusmodi facta fuerint) possunt meliùs & utiliùs emendari. Item inquirere oportet, quid ꝑceptum fuerit in fructibus, & bladis, & redditibus, & aliis terrarum cōmoditatibus. Item estimare oportet diligenter quale cōmodum habiturus esset disseysitus, si a tenemēto non fuisset ejectus. Item si cum res restituatur disseysito, sicut fundus, tenemtum, vel hujusmodi, habēda erit ratio rerum ablatarum, quæ cum ipsa re restituantur, sicut sunt arma, utensilia, equi, & boves, & hujusmodi, & quę aliquādo etiā sine ipsa re restitui debent, sive ibi fuerit disseysina sive non; & si hujusmodi res non restituantur, tamen semꝑ durabit jurisdictio justiciariorum, donec fuerint cum ipsa re restitutæ. Itē ōnes res restituēdæ sunt, & non solum quę ꝑpria[1] fuerunt ipsius disseysiti, verum etiā omnes illæ quæ apud illum depositæ, commodatæ, vel impignoratę fuerunt, vel quarum usum, vel usum fructuum habuit, vel quę ei locatę fuerant, quia hæc omnia sub (habendi) verbo continentur. Itē non solum hæ res, quę tunc fuerunt cum disseysina facta esset, verumetiā & quicquid postea desiit illic esse, ut si pecora mortua sint post disseysinā: quia licet disseysitor amiserit, & dānum senserit, hoc non erit imputandum disseysito. Item si ædes incendio cōsumptæ fuerint, earum precium restitui debet ꝑ assisam, quia disseysitor ad casus fortuitos tenebitur. Itē non solum
f. 187 b. restituendæ sunt res quæ illic habuit disseysitus cum disseysiretur, verùm etiam sive in eo loco a quo dejectus est, sive in omni possessione: quia ad omnem

[1] "Propriæ," MS. Rawl. C. 160.

done in the houses, gardens, woods, and other places, and what waste the disseysors have caused, and what exile, and what distress, and in what manner, and for how much (when these things have been done) they can be better and more usefully amended. Likewise they ought to inquire what has been received by way of fruits and corn and rents and other commodities of the lands. Likewise they ought to estimate diligently what advantage the disseysee would have had if he had not been ejected from his tenement. Likewise when the property is restored to the disseysee, as the ground, the tenement, and such like, regard must be had for the things taken away, which should be restored together with the property itself, such as arms, utensils, horses and oxen, and such like, and which sometimes ought to be restored without the property itself, whether there has been a disseysine or not; and if things of this kind are not restored, nevertheless the jurisdiction of the justices will always last till they have been restored together with the thing itself. Likewise all the things are to be restored, and not those things which were the property of the disseysee, but likewise all those things which were deposited with him or lent to him, or pledged to him, or of which he had the use or the fruits, or which were lent to him, for all these things are contained under word "have." Likewise not only these things which were there when the disseysine was made, but also whatever ceased to be there afterwards, as if the sheep have died after the disseysine; because although the disseysor has lost them and felt the loss, this is not to be set to the account of the disseysee. Likewise if buildings have been consumed by fire, their price ought to be restored by an assise, because the disseysor will be liable for all accidents. Likewise not only are the things to be restored which the disseysee had there when he was disseysed, but likewise if he had any in that place from which he was disseysed, or in any possession: be-

inquire respecting damages.

f. 187 b.

partem possessionis refertur, qua quis caruit cum fuerit disseysitus. Itē à die quo quis disseysitus est, fructuum ratio habenda est, & non retro cōputantur. Item rerum mobilium quę tunc ibi fuerant cōputandi sunt fructus, ex quo quis disseysitus fuit; & non solum fructuum ratio habēda est, sed etiam omnis utilitatis omnium rerum, quæ ille habiturus esset, si non esset disseysitus. A judice autē estimanda sunt damna, vel ad plus vel ad minus, habita ratione meliorationis, & secundùm quosdam videtur contrarium, quia disseysitor meliorationem fecit ad opus suū ꝑprium, & non ad opus disseysiti: & ideo videtur ꝙ melioratio cedit cum terra, & ex quo disseysitor alienū scienter melioravit, donasse videtur, scivit enim aut scire debuit. Sed revera melioratio minuit damna, & exonerat disseysitorem in parte, & aliquando in toto, ut ꝑ exemplum: ꝑ assisam istā[1] ipse qui disseysivit tenetur rem disseysitā restituere, licet tempore assisæ captæ, dū tamen post impetrationem, non possiderit disseysitor, sed ad alium transtulerit, sive ille ad quem res translata fuerit, ulterius transtulerit ad plures manus, sive nō, cum res per impetrationem diligentem & prosecutionem diligentem litigiosa effecta fuerit. Item videndum quis teneatur ad damna restituenda, & quis non, & secundùm hoc[2] oportet considerare rigorem juris vel æquitatem, s. ꝙ jus est ars boni & æqui, & sciendum quod illi participes esse debent in damno, qui participes fuerunt in lucro: s. omnes principales quatenus sufficiunt, & si non sufficiunt, tunc recurrendum est ad alios de forcia & consilio.

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[1] "per assisam autem ipsam," MS. Rawl. C. 160.

[2] "et secundum hoc" down to "lucro," omitted in MSS. Rawl. C. 160 and 159.

cause reference is had to every part of the possession, of which any one has been deprived when he has been disseysed. Likewise from the day on which he was disseysed, an account is to be made up of the fruits, and they are not to be computed back. Likewise the fruits of the movables, which have been there at the time, are to be computed from the time when a person was disseysed, and not only an account has to be made up of the fruits, but also of all the utility of all the things which he would have had, if he had not been disseysed. But the damages are to be estimated by the judge, either more or less, regard being had to the amelioration, and according to some persons the contrary seems right, because the disseysor has made the amelioration for his own use, and not for the use of the disseysee, and for this reason it seems that the amelioration goes with the land; and since the disseysor has knowingly improved another person's land, he appears to have made a donation [of his improvements], for he knew or ought to have known it. But in reality an amelioration diminishes the damage, and exonerates the disseysor in part, and sometimes altogether, as for example: by that assise the disseysor is bound to restore the thing disseysed, although at the time of holding the assise he had it not, provided however he has ceased to have it after the writ has been sued out, and has transferred it to another, whether he to whom the thing has been transferred has further transferred it to several hands or not, since the thing through a diligent suing out of the writ and a diligent prosecution of it has become litigious. Likewise it is to be seen who is bound to restore the damage, and who not, and according to this we ought to consider the rigour of the law or the equity, to wit, because right is the art of what is good and equal, and it is to be known that they ought to share in the loss who have partaken of the gain, that is all the principals, as far as they suffice; and if they do not suffice, then recourse must be had against the accessories and the advisers.

Cap. XX.

1. De exceptionibus. Exceptio contra breve, sive contra jurisdictionem. Britton, l. i. ch. xvii. § 1. Fleta, 233.

Dictū est supra quid juris, si tenēs nihil velit vel sciat dicere cōtra assisam, vel excipere quare remaneat imppetuum vel ad tempus. Nunc autem dicendum si velit excipere, sive contra breve, sive contra psonam querentis, sive contra assisam. Sunt enim exceptiones, quæ competunt contra breve, & assisam differunt, sed non perimunt. Sunt etiam quædam exceptiones contra personam querentis, quę assisam omnino perimunt. Est enim peremptoria brevis, & dilatoria judicii, est etiam quædam peremptoria quantùm ad personam unius & dilatoria judicii, & non peremptoria quantum ad personam alterius; ut si querens actionem non habeat, sed alius, & competat alteri actio, sed non sibi. Item sicut competit contra personam, ita competit contra assisam. Si autem breve non valeat ab initio, non erit ulterius procedendum. Si autem breve valeat, tunc recurrendum est ad personam, & videndum si ei cōpetat querela vel non; postea vero ad assisam, si tenens
f. 188. injuste & sine judicio disseysiverit ipsum querentem, ut dicit, de libero tenemento suo in tali villa & post talem terminum.

2. Quæ exigantur ad hoc, quod procedat assisa.

Inprimis autem oportet cōfirmare breve confirmatâ jurisdictione, sic ut justiciarii habeāt potestatem judicandi, & autoritatem superioris, ut per breve speciale, vel per generalem summonitionem, ut supra videri possit in principio manifestè. Cū autem confirmata fuerit persona justiciarii, oportet q breve competens sit actioni. Item quod querens habeat actionem, &

Chapter XX.

We have explained above what is the right, if the defendant does not wish or know to say anything against the assise, or object why it should be a *remanet* for ever or for a time. Now we must consider if he wishes to object either against the writ, or against the person of the plaintiff, or against the assise. For there are exceptions which may be taken against the writ, and which delay, but are not fatal to it. There are also exceptions against the person of the plaintiff, which are altogether fatal to the assise. For there is a peremptory exception to the writ and which defers the trial, there is also an exception, which is peremptory as regards the person of one and defers the trial, and not peremptory as regards the person of another, as if the plaintiff has no right of action, but another person has, and another person and not he himself is entitled to bring an action. Likewise as an exception may be taken to the person, so it may be taken to the assise. But if the writ is not valid from the commencement, then no further proceedings are to be taken. But if the writ is valid, then recourse must be had to the person, and it is to be seen if he is entitled to a plaint or not; but afterwards recourse may be had to the assise, if the defendant has unjustly and without a judgment disseysed the plaintiff, as he says, from his free tenement in such a vill and after such a term.

1. Of exceptions. An exception against the writ or against the jurisdiction.

f. 188.

In the first place he ought to confirm the writ by confirming the jurisdiction, so that the justices should have the power of judging and the authority of a superior, as by a special writ or by a general summons, as may be seen clearly in the beginning. But when the person of the judge has been confirmed, it is requisite that the writ should be applicable to the action. Likewise that the plaintiff should have a right of action,

2. What things are required, that the assise should proceed.

tenens habeat exceptionē, & quod certa res in judicium deducatur, ut supra.

3. De exceptionibus contra breve. Britton, *ib.* § 2. Fleta, *ib.*

Confirmata igitur ꝑsona justiciarii, & audito brevi, excipiat tenens inprimis contra breve, si videat sibi exceptionem competere. Multipliciter enim excipi poterit cōtra breve, ut si in se vitiosum sit, si appensum fuerit sigillū adulterinum, vel etiā si rasura si[1] in loco suspecto, ubi nomina scribuntur, & non jura. Item si in se cōtineat aliquam falsitatem, q̄ non habeat in verbis cancellarię ordinatā dispositionem, nec verborum ordinem, nec stilum calami, ita q̄ concordet manibus notariorum. Suspitio etiam esse poterit, in nominibus tenementorum, locorū, & aliorum quæ sunt judicii principalia, & quæ certa sunt, & quę varietatem non admittunt. In aliis vero quæ juris sunt non est multum curandum de rasura, quia rasura in illis, quę juris sunt, non multum inducit suspicionis. Jura enim & consuetudines & alia quæ communia sunt omnibus, ubique scribi possunt, nisi hujusmodi suspicionem inducant calami diversitas, vel atramenti; & si in loco suspecto inveniatur rasura, videndum erit & distinguendum, utrum brevia sunt, quæ diriguntur vicecomitibus, clausa vel aperta. Item utrum id quod suspectū est in cancellaria sit emendatum, vel ab alio sicut a clerico vic. si clausum fuerit, vel apertum sit, si nomen alicujus, vel aliud quid, prius scriptum inconsultè, deletum, q̄ ex hoc pręsumi possit vehementer, ut si breve illud aliquo tempore sub alio nomine recitatum fuerit & auditum, & qui hoc veraciter protestentur, ille qui super hoc conventus fuerit & convictus, dum querela tamen prius in judicium deducatur, & facta

[1] "sit," MS. Rawl. C. 160.

and the defendant a right of exception, and that a thing certain should be brought into judgment as above.

3. Of exceptions against the writ.

The person of the judge having been confirmed and the writ having been read aloud, let the defendant in the first place except against the writ, if he sees that he is entitled to except. For manifold exceptions can be taken to the writ, as if it be faulty in itself, if it has an adulterine seal appended to it, or if there be an erasure in a suspected place, where the names and not the rights are written. Likewise if it contains in itself some falseness, that it has not in the words of the chancery the ordinary arrangement, nor an order of words, nor a style of the pen, such as would agree with the hands of notaries. There may be also suspicion in the names of the tenements, of the places, and other things which are the principal matters of a judgment, and which are certain, and which do not admit of variation. But in other things which are concerned with the right there is not much regard to be paid to an erasure, for an erasure in those things which are concerned with the right does not cause much suspicion. For rights and customs and other things, which are common to all, may be written anywhere, unless the difference of the pen or of the ink induce suspicion; and if the erasure is found in a suspected place, it is to be seen and to be distinguished, whether they are writs which are directed to the viscounts close or open; likewise whether that which is suspected has been amended in the chancery, or by another person, such as the clerk of the sheriff, if it was a close writ or an open writ, if the name of any person or something else, which was written first carelessly, has been obliterated, which may be strongly presumed, so that, if that writ has been at some time read and heard under another name, and there are some who bear witness to the truth of this, he who has been convened and convicted for this, provided, however, the complaint be first brought into judgment and an

inquisitione culpabilis inveniatur, tanquā falsarius puniatur. Item videndum erit, si tempore datæ aliqua fuerit causa impetrandi vel nulla, & ideo respiciēda erit data, si fortè deleta fuerit vel in aliquo mutata, & p hoc erit suspicio de data, & q non valet impetratio, quæ nulla est nisi subsit causa vera impetrandi. Et q cadere debeat breve, probatur in itinere W. de Ralegh in comitatu Warr̃, assisa novæ disseysinę si Gerardus filius Wilhelmi. Item si de cōsimili brevi & etiam assisa omnino se retraxerit, & tamen non ꝑpter vitium & errorem. Item si prius incepit agere de seysina aliena quam ꝑpria, per assisam mortis antecessoris, p breve de ingressu, vel per breve de recto, vel p aliud qualecunque, ordine brevium non observato. Item si aliquid consimile impetravit coram eodem judice vel diverso, à cujus ꝑsecutione per licentiam vel alio modo non recessit. Item si impetratum fuerit cōtra jus commune, quod plures querentes in uno brevi contineantur, ubi diversæ sint querelæ, diversæ personæ, & diversæ disseysinæ, nisi ubi unicum fuerit jus & diversæ personę sicut unus hæres, sicut sunt illi qui cohæredes sunt & participes & tenuerint in communi.

f. 188 b. 4. Quod error multiplex est. Britton, *ib.* § 6. Fleta, 234.

Item error ꝑmit breve, sed non judicium, nec assisam. Error autē multiplex esse poterit in persona querentis, ut si erraverit impetrando contra personam ejus, qui nomine possidet alieno, & non ꝑprio, ut firmarius, vel prior, vel canonicus amotibilis, ut prędictum est, & inferius dicetur, nec talibus competit exceptio, nec querela. Itē procedere non debet assisa propter errorem nominis, ut si pro Henrico ponatur in brevi

inquest having been held he is found guilty, should be punished like a forger. Likewise it is to be seen if at the time of the date there was any cause for suing out a writ or none, and therefore the date is to be regarded, if by chance it has been obliterated, or changed in any respect, and through this there be suspicion as to the date, and that the suing it out is invalid, since it is null unless there was a true cause for suing it out. And that the writ ought to fail is proved in the iter of William de Ralegh in the county of Warwick in an assise of novel disseysine, if Gerard the son of William. Likewise if he has withdrawn himself from a similar writ and likewise altogether from the assise, and yet not from any fault or error. Likewise if he has commenced proceedings concerning the seysine of another prior to his own, by an assise of the death of an ancestor, by a writ of entry, or by a writ of right, or by something else, the order of the writs not having been observed. Likewise if he has sued out a similar writ before the same judge or a different one, from the prosecution of which he has not withdrawn by license or in some other way. Likewise if it has been sued out against the common law, that several plaintiffs are comprised in one writ, where there are different complaints and different persons, and different disseysines, unless where there is a single right and different persons as one heir, such as those who are coheirs and parceners and tenants in common.

f. 188 b. 4. That error is manifold.

Likewise an error is fatal to a writ, but not to a judgment, nor to an assise. But an error may be manifold in the person of the plaintiff, if he has erred in suing it out against the person of him, who possesses in another's name and not in his own, as a farmer or a prior or a removable canon, as aforesaid, and it will be explained below, nor are such persons entitled to an exception nor to a complaint. Likewise an assise ought not to proceed on account of an error in the name, as if for

Wilhelmo, & e contrario. Idem erit si erratum fuerit in cognomine, ut si dicatur Hughbertus Roberti, ubi dici deberet Hughbertus Walteri. Item idem erit si erratum fuerit de nomine villæ, de qua quis inducit originē, ut si pro Londoñ nominet quis in brevi Winton. Item si erratum sit in syllaba, ut si quis alium nominet Henricum de Brochetō,[1] ubi nominari deberet Henricus de Bracton.[2] Item idem erit in litera, ut si quis erraverit sic nominādo Henricum de Bracthon,[3] ubi nominare deberet Henricum de Bractō,[4] & omnia ista probari possunt p exempla. Item adhuc idem erit, si de nomine cōstiterit & cognomine, erratum tamen sit in nomine dignitatis, ut si dicatur in brevi: Questus est nobis Hēricus de Bractona præcentor, cum sit decanus, & sic cadit breve. Item si erratum sit in persona, & non in nomine nec in cognomine, scilicet cum pater & filius vocentur eodem nomine & cognomine, & patri facta fuerit disseysina, si filius impetraverit sub eodem nomine patris de disseysina patris, non recuperabit, quia non ei facta fuit injuria, sed patri, & sic ipse non habebit querelam, sed pater si viveret, & licet habeat idem nomen & cognomen, persona tamen diversa est & non eadem, cui facta est injuria. Idem autē erit, si filius de disseysina patris & de facto patris eodem nomine nuncupatus post mortem patris, si velit sibi perquirere per breve de ingressu de disseysina facta patri. Item error in actione, ubi quis credidit actionem competere, quæ non competit.

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[1] "de Broctone," MS. Rawl. C. 160.
[2] "Bractone," *ib.*
[3] "Bractone," *ib.*
[4] "Brattone," *ib.* c

"Henry" there is inserted in the writ "William," and the converse. Likewise if there has been an error in the surname, as if it is written Hughbert Robertson, when it ought to be written Hughbert Walterson. Likewise it will be the same if there be an error in the name of the vill, whence a person has his origin, as if instead "of London" a person is described in the writ as "of Winchester." Likewise if there be an error in a syllable, as if one should name another Henry de Brochetone, when he ought to be named Henry de Bracton. Likewise the same will apply to a letter, as if a person has erred in naming a person Henry de Bracthon, when he ought to name him Henry de Bracton, and all these things can be proved by examples. Likewise the same will be, if the name and surname are correct, but there is an error in the description of the dignity, as if it be said in the writ Henry de Bracton, the precentor, has made complaint, instead of Henry de Bracton, the dean, and so the writ fails. Likewise if there be an error in the person, and not in the name or in the surname, as when a father and a son are called by the same names and surnames, and the disseysine has been made against the father, if the son has sued out a writ under the same name of the father concerning the disseysine of the father, he shall not recover, because the injury has not been done to him, but to his father, and so he himself shall not have a plaint, but his father, if he be living, and although he has the same name and surname, the person however is different to whom the injury is done, and not the same. But the same thing will occur, if the son bearing the same name as his father sues concerning the disseysine of his father and the act of his father after the death of his father, if he should wish to claim for himself by a writ of entry concerning the disseysine done to his father. Likewise there is an error in the action, when a person has believed that he is entitled to an action, to which he is not entitled.

5. De errore circa personam sive circa corpus sive circa officium.

Britton, *ib.* Fleta, *ib.*

Ut autem plenius habeatur notitia circa quæ versetur error, sciendum quod versatur aliquando error circa personam, sive circa corpus, sive circa officium, sive circa rem, sive circa causam. Circa personam vero contingit errare dupliciter, quandoq̃ ex imperitia sive negligentia impetrantis, quandoque ex dolo adversarii. Ex imperitia vero impetrantis, ut si quis nominaverit Petrum, ubi nominasse debuit Rogerum, & propter talem errorem cadit breve multis rationibus. Item si quis binominis fuerit, sive in nomine ꝑprio, sive in cognomine, illud nomen tenēdum erit quo solet frequentius appellari: quia ideo imposita sunt ut demonstrent voluntatem dicentis, & utimur notis in vocis ministerio. Idem est si in prænomine, agnomine, & cognomine. Idem erit si erratum sit in nomine appellato, ut si quis vestem nominaverit, ubi nominare deberet pecuniam. Item provenit error ex dolo adversarii, scilicet quando adversarius dolosè in absentia impetrantis commutat possessionem, ut adversarius rediens & novum possessorem inveniens, ipsum, tanquam eum de quo in brevi nulla fit mentio, convenire non possit nec implacitare: & videtur quod non, quia in brevi non comprehenditur, & multis aliis rationibus; verius tamen est quod possit, & debeat respondere, alioquin posset ille qui possessionem mutavit, ne cum eo ageretur, de dolo suo commodum reportare, &
f. 189. multis aliis rationibus, & ideò poterit uterq̃ conveniri simul vel per se, & hoc licet translatio fiat antequàm breve perveniat ad justiciarios vel vic., dum tamen

5. Of error about the person, or the body, or the office.

That, however, fuller knowledge may be had concerning what things error is conversant, it is to be known that error is concerned sometimes about the person or about the body, or about the office, or about the thing, or about the cause. About the person a double error is possible, sometimes from the unskilfulness or negligence of the party suing out the writ, sometimes from the deceit of an adversary. But from the unskilfulness of the person suing out, as if a person has mentioned "Peter" when he ought to have mentioned "Roger," and on account of such an error the writ fails for many reasons. Likewise if a person has two names, whether in his name or in his surname, that name is to be retained by which he is accustomed to be called: because they are imposed for that reason that they may show the intention of the speaker, and we use marks in the ministry of the voice. The same thing arises if there be an error in the Christian name, the family name, or the characteristic name. The same thing will occur if there be an error in the name of the charge, as if a person should have mentioned a vestment, when he ought to have mentioned money. Likewise error arises from the deceit of the adversary, to wit, when the adversary deceitfully, in the absence of the suitor, changes the possession, so that the adversary, returning and finding a new possessor, cannot convene or implead him, as being a person concerning whom no mention is made in the writ, and it seems that he cannot, because he is not comprised in the writ, and for many other reasons ; it is more true, however, that he can, and that he ought to respond, otherwise he might, who has changed the possession, derive advantage from his deceit, so that no action could be brought against him, and in many other ways, and for that reason each may be convened together or by himself, and this although the transfer has been made before the writ has come to the justices or the viscount, provided there has been a f. 189.

diligēs existerit prosecutio. Eodē modo fieri possit, si res post judicium ad alium transferatur.

6. De errore circa nomen vel dignitatem.

Item poterit esse error circa officium sive dignitatem, ut si quis præcentorem nominaverit pro decano, vel è cōtrario: circa officium, ut siquis nominaverit coronatorē pro vic. vel è contrario. Nomen vero dignitatis vel officii non mutatur, nec etiam nomē proprium: errari tamē poterit circa ea, unde et si exprimatur verū nomen & fiat error circa dignitatem vel officium, tenet breve. Si autē fiat error circa nomē, & de dignitate vel officio non erretur, tenet breve; aliquando vero nomē propriū non exprimitur, & tunc tenet nomē dignitatis vel officii; & si circa ea nō erretur, & tenebit breve, quantum ad eorum successores in causa civili, ubi nulla sequitur pœna. Si autem actio fuerit pœnalis ex delicto, extēditur etiam ad successores nō expresso proprio nomine, sed non ad pœnā, sed quoad restitutionē, si possit restituere. Si autem nomē propriū exprimeretur, non esset ita. Officium verò & dignitas fere se habent ad idem, sed quælibet dignitas est aliquod officium, sed omne officium non est dignitas. Officium verò bene potest esse sine dignitate, ut officium vicecomitis & coronatoris. Itē si diacon^{9} nominetur pro sacerdote, non expresso proprio nomine, vel è contrario, cùm sacerdos utrāque contineat dignitatem.

7. De errore circa ipsam rem.

Itē quandoq; fit error circa ipsam rem, ut si quis nominaverit vineam, ubi nominare debeat ecclesiam: item lanceam, ubi vestem. Rerū enim vocabula immutabilia sunt, hominum verò sunt mutabilia. Item

diligent prosecution of it. In the same way it may be done, if the thing has after the judgment been transferred to another.

6. Of error about the name or dignity.

Likewise there may be error about the office or dignity, as if a person has named a precentor instead of a dean, or on the contrary; concerning the office, as if a person has named a coroner instead of a viscount, or the converse. For the name of dignity or of office is not changed any more than the proper name of a person. There may, however, be an error concerning those things, whence if the true name be expressed and there be an error about the dignity or the office, the writ holds good. But if there be an error in the name and there be no error in the dignity or in the office, the writ holds good, but sometimes the proper name is not expressed, and then the name of dignity or of office holds good, and if there be no error in them the writ also shall hold good as far as regards their successors in a civil cause, where no penalty follows. But if the action has been a penal action from an offence, it is extended to the successors, no proper name having been expressed, but not as regards the penalty, but as regards restitution, if he can restore. But if the proper name had been expressed, it would not be so. But office and dignity have for the most part reference to the same thing, but every dignity is an office, although not every office is a dignity. But an office may well be without a dignity, as the office of viscount or of coroner. Likewise if a deacon be named instead of a priest, no proper name having been expressed, or on the contrary since a priest comprises both dignities.

7. Of error concerning the thing itself.

Likewise sometimes there is an error about the thing itself, as where a person has mentioned a vine, where he ought to have mentioned a church; likewise a dish, where he ought to have mentioned a vestment. For the names of things are unchangeable, but of men are

error poterit esse in qualitate rei & quantitate. Itē in precio, numero, pondere & mensura. Item in genere & colore. Itē error poterit esse circa rem in loco, ut si quis dicat, quod res sita sit in uno loco, cùm sita sit in alio; sed error ille nocere non deberet, cùm per circūstantias colligi possit id, quod petens in mente habuit. Eodem modo dici posset de distinctione agrorum ubi visus petitur, quia non refert utrum quid fiat, vel quod tantundem valeat.

8. De errore circa causam.

Item fit error circa causam, ut si quis dederit intelligi impetrando quod justè possideat, vel quòd injustè possederit, vel quòd nunquam possedit, in quo casu videndum si causa sit casualis, tunc non impedit processum, si autē conditionalis impedit omninò.

9. De errore circa locum. Britton, l. ii. ch. xvii. § 7. Fleta, 234.

Item poterit error esse circa locum, & si disseysitus impetraverit ad vicecomitem, in cujus comitatu tenementum non fuerit, vel si dicat tenementū esse in una villa, quod revera est in alia, sicut pleniùs dicetur inferiùs. Plures autem sunt exceptiones contra breve inferius assignatæ in causa proprietatis, quarum quædam locum habent hic, quædam verò non, & sicut exceptiones, quæ assignatæ sunt contra breve in causa possessionis, locum habent hic & non ibi, & ideo omnes exceptiones contra breve, uno loco comprehendi non possunt, & ideo quod hic non invenitur, ibi inveniri poterit.

10. Exceptio si breve sit deperditum.

Sed quid dicendum erit, si breve originale erit perditum per alicujus negligentiam, vel in curia? tunc videndum erit utrum unquam in curia coram justiciariis recitatum fuerit & auditum, & tunc bene possunt justiciarii procedere, dum tamen hoc fuerit in præ-

changeable. Likewise there may be error in the quality and in the quantity of a thing. Likewise in the price, the number, the weight, and the measure. Likewise in the kind and the colour. Likewise there may be an error about the thing in its place, as if a person should say that the thing is situated in one place, when it is situated in another, but that error ought not to be hurtful, since it may be inferred through circumstances what the plaintiff had in his mind. In the same way it may be said concerning the distinction of fields where a view is claimed, because it does not matter whether a thing is done, or what is equivalent.

8. Of error about the cause.

Likewise there is error about the cause, as if a person has caused it to be understood in suing out a writ, that he possesses justly, or that he possessed unjustly, or that he never possessed, in which case it must be seen if the cause is accidental, then it does not impede the proceeding, but if it is conditional, it impedes it altogether.

9. Of error about the place.

Likewise there may be error about the place, and if the disseysee has sued out a writ for the viscount, in whose county the tenement is not, or if he should say that the tenement is in one vill when it is of truth in another, as will be explained more fully below. But there are many exceptions against a writ assigned below in a cause of property, of which some have a place here, and some not, and as exceptions which are assigned against a writ in a cause of possession have a place here and not there, and for that reason all the exceptions against a writ cannot be comprised in one place, and for that reason what is not found here, will be found there.

10. An exception if the writ has been lost.

But what shall we say, if the writ has been lost through somebody's negligence, or in the court? Then we must see whether it has been read over and heard in the court in the presence of the justices, and in that case the justices may well proceed, provided this be in the presence of the parties. The same will result, if the writ f. 189 b.

f. 189 b. sentia partium. Idem erit, si irrotulatum post visum petitum, vel warantū vocatum. Sed quid si nunquam fuerit auditum, vel recitatum coram justiciariis, sed breve de warantia de capiendo assisam? videtur quod breve illud sufficiat ad procedendū, cum omnes articuli brevis originalis ibi sint contenti, & aliquando nomina disseysitorum, ad omnia igitur bene poterit procedi per breve istud, dum tamen vicecomes cognoscat qd. breve originale susceperit, & quia rex testatur in literis suis patentib⁹ qd. talis arramavit assisam versus talem de tali tenemento & in tali villa, & sic omnes articuli contenti sunt, & qd. quidem rex testatur. Sed quid si breve fuerit patens & apertum, & sigillum omnino fractum fuerit, vel cauda rupta? non erit tali fides adhibenda. Item si fuerit omninò falsum, ut si appensum fuerit signum adulterinum, vel si fractum fuerit omnino, & stilo cancellariæ non consonum. Si quis tali brevi usus fuerit & convict⁹, puniatur, ut supra de crimine læsæ maiestatis, nisi warantū habuerit qui breve illud advocaverit.

11. Quando tenere debet breve in persona successoris, quod impetratum est versus prædecessorem.

Item, inter cętera videndū, quandò tenere debet breve impetratum versus predecessorem in persona successoris, sive in causa possessionis sive in causa proprietatis, ut si abbas vel prior disseysinam fecerit, & postea amotus fuerit vel deposit⁹, manens in eadem domo vel alia, vel mortuus post disseysinam. Quo casu, refert utrum impetratum fuit contra eos statim post disseysinam ante amotionem & depositionē vel post, & tunc utrum expresso nomine proprio & nomine dignitatis simul, vel tantum sub nomine dignitatis. Sed sive sic sive sic, semper tenentur respondere, dum vivi fuerint post breve impetratum ubicunq; fuerint,

has been enrolled after a view has been claimed or a warrantor has been called. But what if it has never been heard or read over in the presence of the justices, but the writ of warranty for holding the assise? It seems that the latter writ is sufficient to proceed, since all the articles of the original writ are contained in it, and sometimes the names of the disseysees, therefore everything can well be proceeded with by that writ, provided that the viscount acknowledges that he has received the original writ, and because the king bears witness in his letters patent, that such an one has instituted an assise against such a person concerning such a tenement and in such a vill, and so all the articles are contained, and which indeed the king testifies. But what if the writ be patent and open, and the seal is altogether fractured or the tail snapped, to such a writ faith is not to be given. Likewise if it should be altogether false, as if an adulterine seal should have been appended to it, or if it should be altogether fractured, and it is not consonant to the style of the chancery. If any one has used a writ of this kind and is convicted, let him be punished, as above concerning the crime of high treason, unless he have a warrantor who will avow the writ. f. 189 b.

11. When a writ ought to hold good in the person of a successor, which was sued out against his predecessor.

Likewise amongst other things we must see, when a writ sued out against a predecessor ought to hold good in the person of his successor, whether in a cause of possession or of property, as if an abbot or a prior has made a disseysine, and has afterwards been removed or deposed, remaining in the same house or in another, or having died after the disseysine. In which case it matters whether it was sued out against them immediately after the disseysine before the removal or the deposition, or afterwards, and then whether with the proper name expressed and the name of dignity together with it, or only with the name of dignity. But whether in one way or in the other, they are always bound to answer, provided they are alive after the writ

quia personalis est injuria, & hoc sive sit alius substitut^{o} sive non, cùm res effecta sit litigiosa per impetrationē ante creationē alterius abbatis. Et quamvis abbas depositus fuerit vel amotus post injuriam, non tamen aboletur pœna propter mutationem dignitatis vel officii, cùm adhuc duret injuria, quæ personalis est, & quæ personam sequitur. Si autem depositus fuerit ante impetrationem, & postea impetretur, tunc refert utrum ante impetrationem creatus sit alius abbas vel non. Si autem alius abbas creatus fuerit ante impetrationem, tunc oportet tam disseysitorem quàm substitutū in brevi comprehendere, cùm substitutus teneatur ad restitutionē, si factum depositi advocaverit, & depositus teneatur ad pœnam. Si autem post impetrationē substitutus fuerit alius ante captionem assisæ, tunc licet in brevi non nominetur, tamen tenebitur, secundum quod factū depositi advocaverit, vel non advocaverit. Si autē nullus omnino ante captionem assisæ fuerit substitutus, tunc procedat assisa contra depositū per tale breve, scilicet quod talis canonicus vel monachus quondam abbas, &c.; & si abbas fuerit substitutus ante impetrationem, tunc: quod talis monachus quondam abbas & talis ei substitutus, &c. Si autem disseysitor mutaverit dignitatem, fiat mentio in brevi de dignitate. Si autem abbas vel prior disseysitor mortuus fuerit ante impetrationem vel post, & sive ante creationē alterius abbatis vel post, & sive nomen exprimatur illius qui mortuus est in brevi sive non, in causa disseysinæ cadit breve, & extinguitur assisa in eo quod pœnalis est, tenet tamen quantum ad abbatem substituendum

has been sued out wherever they may be, because the injury is personal, and this whether another person has been substituted or not, since the thing has been rendered litigious before the creation of another abbot. And although the abbot has been deposed or removed after the injury, the penalty is not however abolished on account of the change of dignity or of office, whilst the injury still lasts, which is personal, and which follows the person. But if he has been deposed after the suing out of the writ, and it be afterwards sued out, then it matters whether another abbot has been created before the writ was sued out, or not. But if another abbot has been created before the suing out, then it is incumbent to comprise the disseysor as well as his substitute in the writ, since the substitute is liable to make restitution if he avows the act of the deposed abbot, and the deposed abbot is liable to the penalty. But if after the suing out of the writ another has been substituted before the holding of the assise, then although he be not named in the writ, nevertheless he will be liable, according as he has avowed the act of the deposed abbot, or not avowed it. But if no one at all before the holding of the assise has been substituted, then let the assise proceed against the deposed abbot under a writ of this kind, to wit, that such a canon or monk formerly abbot, &c.; and if the abbot has been substituted before the suing out, then, that such a monk formerly abbot and such a person substituted in his place, &c. But if the disseysor has changed his dignity, let mention be made in the writ of his dignity. But if the abbot or prior the disseysor has died before the suing out or after it, and whether before the creation of another abbot or after it, and whether the name of him, who is dead, be expressed in the writ or not, the writ fails in a cause of disseysine, and the assise is extinguished as far as it is penal, but it holds good in respect of substituting the abbot as far as it is prosecuted to f. 190.

f 190. in eo qd. est rei persecutoria, & non refert utrum breve impetratum sit contra predecessorem sub nomine dignitatis tantùm, vel sub nomine ꝑprio & nomine dignitatis. Si autem abbas querens mortuus fuerit, eodē modo cadet breve sub nomine suo impetratum, quia non erit qui respondeat, si non sit qui queratur, cùm injuria sit ꝑsonalis. Si autem impetratum fuerit in causa proprietatis contra aliquem abbatē, vel in causa possessionis, quæ non est pœnalis, sicut in assisa mortis antecessoris, si tenens abbas mortuus fuerit, & impetratum fuerit contra eum sub nomine dignitatis vel officii tantùm & non sub nomine ꝑprio, semꝑ tenebit breve in ꝑsona successoris, quod fuit impetratū sub nomine prædecessoris, quia quoad nomen dignitatis, idē est successor cum prædecessore, quia non mutatur dignitas ꝑpter diversitatem ꝑsonarū. Si autē sub nomine ꝑprio & sub nomine dignitatis simul, sive successor idem habeat nomen cum predecessore sive non, sed diversum, cadit breve: quia licet idē sit nomen, tamen diversum est ꝑpter diversitatē ꝑsonæ, licet videatur contrarium, sicut si nominaretur Henricus pater s. & filius vel successor eodem nomine. Si autē impetratum fuerit contra prædecessorē, qui[1] deposit[ꝰ] fuerit, tenetur contra substitutum sive sub nomine dignitatis tantùm vel sub utroque, quia deponi posset in fraudem.

Cap. XXI.

1. Exceptio contra personam querentis, Si vero nihil scit quod excipi possit contra bŕe, sed cùm sufficiens sit in omni sui parte, non abrasum in aliquo loco suspecto, licet tamen in narratione & in

[1] "et qui," MS. Rawl. C. 160.

recover the thing, and it does not matter whether the writ has been sued out against the predecessor under the name of his dignity only, or under his proper name and the name of his dignity. But if the abbot plaintiff has died, in the same way the writ will fail which has been sued out in his name, for there will be no one to answer, if there be no one to complain, since the injury is personal. But if a writ has been sued out in a cause of property against a certain abbot, or in a cause of possession, which is not penal, as in an assise of the death of an ancestor, if the defendant abbot has died, and the writ has been sued out against him under the name of his dignity or of his office only, and not under his proper name, the writ will always hold good in the person of his successor, which was sued out under the name of his predecessor, because as far as regards the name of dignity, the successor is the same with the predecessor, because the dignity is not changed on account of the diversity of persons. But if under his proper name and under the name of his dignity at the same time, whether his successor has the same name with his predecessor or not, but a diverse name, the writ fails; because although the name be the same, it is nevertheless diverse on account of the diversity of the persons, although it seems contradictory, as if Henry should be the name of the father, to wit, and his son or the successor should be named Henry. But if the writ has been sued out against the predecessor, who has been deposed, it is maintained against the substitute, whether under the name of his dignity only or under both, because he might be deposed fraudulently.

Chapter XXI.

But if he knows nothing which can be excepted against as regards the writ, and it is sufficient in every part of it, not having been erased in any suspicious

1. An exception against the person of the

et in primis de statu. Britton, ii. ch. xviii. Fleta, 235.

facto. Item si non deleť vel alio quocunq; modo vitiosum, & in prima sui figura, ꝑposita intentione querentis & fundata, tunc demum videndum est, si sit exceptio aliqua quæ competat tenenti contra querentē ex persona querentis, ut si excipiat tenens contra querentem quod querela ad ipsum non pertineat, nec assisa, sive sit liber sive servus, masculus vel fœmina, major vel minor, ut si querens nomine suo non teneat, sed nomine alieno, quia talibus non competit assisa, sed dominis proprietatis. Et si liber sit, & teneat ad terminū, vel ad voluntatē, vel in villenagium (quod bene facere possit salva libertate sua) cadit assisa omnino in persona sua, nisi replicando docere possit contrarium, scilicet quod teneat nomine proprio qualitercunq; sive per disseysinam sive per intrusionem, dum tamen disseysiri non debeat sine judicio.

2. Si servus objiciatur. Britton, *ib.* Fleta, *ib.*

Si autem sit servus, & teneat in villenagio, dum tamen sub potestate domini constitut⁹, cadit assisa omnino, cùm teneat nomine alieno, nisi replicando docere possit contrarium, scilicet quod libere teneat, vel quod sit extra potestatem dominorum in statu libero, & ita quod in servitutem revocari non poterit sine brevi vel sine judicio.

3. De exceptione et de statu querentis, s. de villenagio.

Et non competit alicui hujusmodi exceptio de villenagio, præterquam vero domino, nisi utrumque probet, scilicet quod villanus sit & teneat in villenagio, cùm per hoc sequatur, quod ad ipsum non pertineat querela sive assisa, sed ad verum dominum, & ideo cadit assisa
f. 190 b. quantum ad personam suam, & non quantum ad personam domini. Si autem verus dominus opposuerit

part, although in the narration and in fact. Likewise if not obliterated or defective in any way, and in its original form, the declaration of the plaintiff having been propounded and supported, then at length we must see if there be any exception which the defendant can take against the plaintiff as regards the person of the plaintiff, as if the defendant should except against the plaintiff that the plaint does not appertain to him, nor the assise, whether he be a free man or a serf, a male or a female, a major or a minor, as if the plaintiff does not hold in his own name, but in another person's name, for such persons are not entitled to an assise, but only the owners of the property. And if he be free and holds for a term, or at will, or in villenage (which may benefit him without endangering his liberty), the assise is barred altogether in his person, unless in replication he can prove the contrary, to wit, that he holds in his own name howsoever, whether by disseysine or by intrusion, provided that he ought not to be disseysed without a judgment.

plaintiff, and in the first place as regards his status.

But if he be a serf, and holds in villenage, provided he is established under the power of the lord, the assise is barred altogether, since he holds in another's name, unless in replication he can prove the contrary, to wit, that he holds freely, or that he is beyond the power of the lord in a free estate, and in such a manner that he cannot be recalled into servitude without a writ or without a judgment.

2. If it be objected that he is a serf.

This kind of exception concerning villenage is not allowable to every one, except to the true lord, unless he prove both things, to wit, that he is a villein and holds in villenage, since it thereby follows, that he is not entitled to a plaint or an assise, but only the true lord, and therefore the plaint is barred as regards the person of the plaintiff, and not as regards the person of the lord. But if the true lord has opposed an exception of

3. Concerning the exception and the status of the plaintiff, to wit, concerning his villenage. f. 190 b.

exceptionem servitutis servo sub potestate sua constituto, sufficit si probet illum esse servum suum vel per parentes vel per assisam. In quo casu terminabitur quæstio status & assisa, nisi fortè liber homo sit bona fide possessus, & proclamare voluerit in libertatē: in quo casu, non nocebit ei ista exceptio & exceptionis probatio, dum tamen se possit probare liberum, & sic exire à statu servili in libertatē. Sed quoniam servus aliquandò est sub potestate domini constitut⁹, & in statu servili in possessione servitutis, aliquandò extra potestatem in statu libero in possessione libertatis, aliquando teneat liberè, aliquando in villenagio, cum questio status incidat in assisam & prejudicialis sit, videndū erit, cui objiciatur & à quo. Cui, utrū s. ei qui fuerit sub potestate domini sui cōstitutus, sive nomine proprio, sive alieno bona fide possesso, sive libero sub potestate alicujus in statu servili existēte qualitercunq; : sive per vim & injustam detentionē, sive per copulā maritalē, sive objiciatur ei qui fuerit extra potestatē, & tūc vel ei qui fugitivus suus est & recentèr fugit de terra sua & recenter insecut⁹, vel non recēter, ita quòd sine brevi revocari non possit in servitutē, vel ei qui nunquam fuit sub potestate sua, sed de nativis suis natus, qui aliquādo fugerunt vel à terra sua vel antecessorū suorum. Item vel eis qui fugitivi sunt revera, sed cum exceptione perpetua muniti vel privilegio, exceptione s. perpetua, qua se tueri possint perpetuò: quia nunquā forte fugerunt de terra opponentis, vel hujusmodi privilegio, quia manentes in civitate aliqua vel villa privilegiata, vel

servitude against a serf established under his power, it is sufficient, if he proves him to be his serf, either through his parents or through an assise. In which case the question of his status and the assise will be terminated, unless by chance he is a free man possessed in good faith, and he wishes to assert his claim to liberty, in which case that exception and the proof of the exception will not hurt him, provided he can prove himself to be free, and so can pass out of a servile condition into one of liberty. But since sometimes a serf is established under the possession of a lord and in a servile state in seysine of servitude, sometimes beyond the power of a lord in a free state in seysine of liberty, and sometimes holds freely, sometimes in villenage, when the question of his status falls into the assise and is preliminary, we must see against whom it can be objected, and by whom. Against whom, whether for instance against a person who is established under the power of a lord either in his own name or in the name of another possessor in good faith, whether a free man being in any manner whatever in a servile state under the possession of any one, whether by force and unjust detention, or by marital copula; or whether it be objected against a person, who is beyond the possession of a lord, and then either against a person who is his fugitive serf, and has recently fled from his land, and has been recently pursued or not recently, in such a manner that he cannot be reclaimed into servitude without a writ; or against a person who never was under his power, but is born of his naifs, who at some time or other fled from his land or from the land of his ancestors. Likewise either against those who are fugitives in reality, but who are furnished with a perpetual exception or privilege, for instance, with a perpetual exception, by which they can always protect themselves, because they have never fled from the land of the opponent, or by a privilege of this kind, because they have abode in some city or privileged

dominico domini regis per unū annū & unū diē sine clamio. Item privilegio clericali. Sed quid dicetur de milite? revera illud idē quod de clerico, donec fuerit per judicium degradatus. Item refert utrū proprio servo objiciatur vel alieno. Item in qua causa, utrum scilicet in judicio petitorio in causa proprietatis, vel querenti in judicio possessorio & restitutionē petenti, in causa possessionis & spoliationis. Item refert utrum queratur & petat restitui de spoliatione propria: vel petat sibi rem reddi de possessione aliena, sicut de seysina alicujus antecessoris sui, quam antecessor habuit die quo obiit, in causa pessessionis ut de feodo. In restitutione spoliationis, non nocet ei qui est extra potestatē constitutus quin recuperet, quia prius inquirendum est de spoliatione quàm de statu. Si autē petat versus dominū in causa proprietatis, ei obstabit exceptio villenagii, & probabitur exceptio villenagii per parentes vel per patriam: ut si servus petat seysinam antecessorum suorum ante fugā. Item ut de feodo & de jure in causa proprietatis, in qua non admittitur ad actionem opposita exceptione servitutis & probata pro statu antecessorum suorum, & de eorum seysina, nisi forte ipsi essent in statu liberali. Si autē objiciatur exceptio villenagii alicui, ut juratori, talis exceptio probatione non indiget nec aliqua solennitate, sed credendum erit simplici verbo conjuratorum sine aliqua sacramento, ut supra de exceptionibus contra juratores.

4. Cui competit exceptio

Item refert à quo opponi debeat, quia quamvis exceptio aliquando competat versus alium, non tamen

vill, or in the demesne of the king himself for a year and a day without a claim. Likewise by the privilege of clergy. But what shall be said of a knight? The same thing indeed as with regard to a clerk, until he be degraded. Likewise it matters whether the objection is raised against one's own serf or against another person's. Likewise in what cause, whether for instance in a petitory suit in a cause of property, or against a plaintiff in a possessory suit and against one claiming restitution in a cause of possession and spoliation. Likewise it matters whether he complains and seeks to be restored to a thing of which he has been personally spoiled, or he seeks to have a thing restored to him which has been possessed by another person, as where one of his ancestors has been seysed of it, which his ancestor had on the day on which he died, in a cause of possession as in fee. In claiming restitution of a spoliation, it does not hurt him who is established beyond the possession of his lord so as to impede his recovery, because an inquiry must be made of the spoliation before his status. But if he claims against his lord in a cause of property, the exception of villenage will be an obstacle to him, and the exception of villenage shall be proved by the parents or by the country: as if a serf should claim the seysine of his ancestors before he became a fugitive. Likewise as in fee and of right in a cause of property, in which he is not admitted to an action, if the exception of servitude be taken and proved as regards the status of his ancestors and their seysine, unless by chance they were in a free state. But if an exception of villenage is objected against any one, as to a juror, such an exception requires no proof nor any solemnity, but credit will be given to the simple word of the fellow jurors without any oath, as above concerning exceptions against jurors.

4. Who is entitled to

Likewise it is of importance by whom it ought to be raised, because although an exception may sometimes be

ceptio villenagii. pertinet ad omnes ut illam opponant. Ideo videndum utrum ille dominus, vel extraneus: & si extraneus, f. 191. utrum ille feoffator fueri,[1] vel alius cujus nulla ratione interfuerit. Si autē dominus, sub cujus fuerit potestate, servus ꝑprius vel alienus, vel liber homo, cujus status sit dubius, an sit liber vel servus, si prima facie assisa sive actio justa videatur, cùm servus exceptionem non habeat contra dominum suum, quia nullum habet liberum tenemētum contra dominū suum, quia quicquid ꝑ ipsum acquiritur, id domino acquiritur, & cùm ipse a domino possideatur, nihil possidere potest, nec proprium habere. Si autem servo alieno vel libero in statu servili constituto, tenebit exceptio donec servus ꝑbetur alienus, vel donec ille liber in servitute detentus se liberum esse ꝑbaverit. Et semper erga tales locum habebit ista exceptio, sive tenemētum fuerit villenagium purū ipsius domini, vel eorum perquisitum ex feoffamento alio. Cùm autem opposita fuerit exceptio a vero domino ei, qui fuerit extra potestatē domini sui & recenter fugerit, tenebit exceptio contra eum, quamdiu dominus eum repetere posset sine brevi, & ita quòd non opportet eum ad alterius auxiliū recurrere nisi suum, & si habere non possit regressum ad villanum suum recuperandum, nisi ꝑ breve, qualiscunq̄ fuerit ille fugitivus, vel qualitercunq̄ fuerit extra potestatem, vel quandocunq̄ fugerit, non tenebit exceptio nec valebit, quousque fugitivus pervenerit in potestatem domini, cum dominus desierit possidere per impotentiā vel negligentiam, & utramq̄ Britton, ii. ch. xviii. § 4. amiserit, naturalē vz. & civilem, quasi exceptione oppositа non suo tempore, nec suo loco: sed villano Fleta, 236. cōpetit restitutio ꝑ assisam, quia forte habet excep-

[1] "fuerit," MS. Rawl. C. 160.

taken against another person, it does not appertain to everybody to raise it. We must accordingly see whether he is the lord or a stranger; and if he is a stranger, whether he is the feoffor of the fee, or another person who has no interest in it. But if he be the lord, under whose power he is, whether as his own serf, or another man's serf, or as a free man, whose condition is doubtful, whether he be a free man or a serf, at first sight the assise or action seems to be just, since a serf cannot raise an exception against his lord, because he has no free tenement against his lord, since what acquisition is made by him, is acquired for his lord, and since he is in the possession of his master, he can possess nothing, nor have anything of his own. But if [the exception is taken] against another man's serf, or against a free man established in a servile condition, the exception will hold good until he is proved to be another man's serf, or until, if he is a free man detained in servitude, he has proved himself to be free. And this exception will always hold good against such persons, whether the tenement be a pure villenage of the lord himself, or their acquisition from another feoffment. But when the exception is raised by the true lord against a person who is out of the power of his lord, and has recently been a fugitive, the exception will hold good against him as long as the lord can reclaim him without a writ, and so that he is not obliged to have recourse to the aid of any other than himself; and if he cannot have recourse to recover his villein except through a writ, of whatever kind the fugitive may be, or in whatever way he may be out of his power, or whenever he may have run away, the exception will not hold good, nor will it avail, until the fugitive has come within the power of the lord, since the lord has ceased to possess him either through powerlessness or negligence, and has lost both kinds of possession, the civil and the natural, as if the exception had been raised not at its proper time nor in its proper place; but the villein is entitled to restitution by an

raise an exception of villenage.

f. 191.

tionē ꝑpetuā, & dominus nunquā audietur excipiendo, donec villanus ꝑvenerit in suam potestatem, qui forte se tueri poterit in statu libero, donec discussum sit utrum liber sit an servus, vel donec dominus in ꝑbatione defecerit vel non defecerit, & cum in causa status per breve de nativis illum in servitutem revocaverit, ꝑbato villenagio, restituetur domino suo cum tota sequela sua, & cum omnibus terris & catallis suis omnibus. Sed quare non potest dominus suus ejicere eum de tenementis acquisitis, & auferre ei catalla sua sine inditio,[1] cum fuerit extra possessionem, antequā corpus disrationaverit? Videtur quòd, si ita esset, hoc esset iniquū, quia non poterit quis habere ꝑtinentias antequā habuerit id ad quod res ꝑtinuerit, sicut videri poterit ꝑ exemplū de advocationibus ecclesiarum. Quia si ad aliquē ꝑtineat manerium aliquod cum advocatione, & fuerit extra possessionem & vacaverit ecclesia, si ꝑsentaverit ꝑpter jus præsentandi quod ad eum pertinebit cum manerio, non valebit præsentatio, antequam disrationaverit manerium ad quod præsentatio pertinuerit. Et vulgariter dicitur, quod primò oportet cervum capere, & postea cum captus fuerit illum excoriare. Item videtur quod non poterit quis terras vel catalla a servo vel fugitivo, qui fuerit extra potestatem & in statu libero, auferre sine corpore, ꝑpter verba in brevi de nativis contenta, ubi præcipit dominus rex quod vicecom̃ faciat ei habere nativum & fugitivum suum, cum tota sequela sua, & cum suis catallis, & unde videtur ꝙ sine judicio catalla sua auferre non potest, quia si ita, talia verba, scilicet (cum catallis) in brevi ꝑperā, ꝑpter personam[2] posita effectum non
f. 191 b. haberent. Item ratio esse poterit quod si inter dominum & servum illum aliàs questio status haberetur,

[1] "judicio," MS. Rawl. C. 160.

[2] "propter personam," omitted MS. Rawl. C. 160.

assise, because he has perhaps a perpetual exception, and the lord shall never be listened to in excepting, until the villein has come within his power, because he can perhaps maintain himself in a free condition until it has been discussed, whether he is a free man or a serf, or until the lord has failed in his proof, or has not failed, and when in a cause of *status* by a writ of naifty he has reclaimed him into servitude, his villeinage having been proved, he shall be restored to his lord with all his following, and with all his land and chattels. But wherefore cannot his lord eject him from the tenements acquired by him without a judgment, when he is out of his possession, before he has derayned his body? It seems that if it were so, it would be inequitable, because a person cannot have the appurtenances before he has the thing to which they appertain, as may be seen by the example of the advowson of churches. Because if a manor with an advowson belongs to any one, and he is out of possession and the church has become vacant, if he has presented on account of his right of presenting which appertained to him with the manor, the presentation shall not be valid, before he has derayned the manor, to which the presentation appertained. And it is commonly said, that you must first catch your buck and afterwards skin him. Likewise it seems that a person cannot take away his lands and chattels from a serf or a fugitive, who is beyond his power and in a free condition, without [having] his body, on account of the words contained in a writ of naifty, in which the lord the king enjoins the viscount to put him in possession of his naif or fugitive, with all his following, and with his chattels, and whence it seems that without a judgment he cannot take away his chattels, because if it were so, the words, for instance, (with his chattels,) placed in the writ near the person wrongly would have no effect. Likewise the reason may be that if a question of status was raised elsewhere between the master and the serf, f. 191 b.
the exception of spoliation would be always in the way

obstaret semper domino petenti exceptio spoliationis, donec servus ad plenum restitueretur. Quid etiam juris clamare poterit dominus in catallis vel tenemento quasi in accessorio, cum nihil juris clamare poterit in corpore quod est principale, & sicut non habet locum exceptio a domino proposita contra eum qui fuerit extra potestatem, quia si exceptio domini prima facie justa videatur, tamē eliditur per replicationem quod sit extra potestatem quasi sui juris, quæ, si necesse fuerit, multipliciter probatur, & quod ejici non possit antequam corpus disrationetur, quia per eos tantum acquirimus, quos sub potestate nostra habemus, sicut per servos & liberos &c. Et quod per tales acquiritur, dominorum erit, quod autem per illos qui extra potestatem sunt, non nisi tunc demùm, cum in nostram devenerint potestatem. Si autem extraneus fuerit, qui ejecerit servum alienum extra potestatem constitutum, multo fortius non habebit locum in persona sua exceptio, quia jus non habet, cum locum non habeat in persona domini, qui jus habet in persona servi. Et ideo quamvis aliâs locum haberet in persona domini, ut predictum est, si servus fuerit sub potestate, tamen non competit cuilibet de populo ut illam opponat, nisi jus habeat opponendi, vel si competat, & illam opponat, elidi poterit per replicationem, vel quia non ptinet ad opponentem ut illā opponat, quia jus non habet, vel si jus haberet, elidi posset p replicationem ab eo qui jus haberet replicandi; quia sicut non habet quis jus excipiendi, cum sua omnino non intersit, cum extraneus sit, ita non pertinebit ad querentem replicatio, quia replicatio pertinet ad alium & non ad ipsum, & sic in persona ejus, cujus revera servus non interfuerit,

of the lord as plaintiff, until the serf had recovered everything. Also what right can a lord claim in chattels or in a tenement as if it were an accessory, when he can claim no right in the body of the person which is the principal thing, and as an exception propounded by a lord against him who is out of his power has no place, because if the exception of the lord seems at first sight just, nevertheless it is parried by a replication that he is beyond his power, as it were independent, which, if it were necessary, is proved in manifold ways, and that he cannot be ejected before his body is derayned, because we acquire only through those whom we have under our power, as through serfs and children, &c. And what is acquired through such persons, will belong to their lords; but what is acquired by those who are beyond our power, will only then be acquired, when they have come within our power. But if he be a foreigner, who has ejected another person's serf established beyond his power, with much greater reason an exception in his person will not hold good, because he has no right, since it has no place in the person of the lord, who has no right in the person of the serf. And accordingly, although it may otherwise hold good in the person of the lord, as aforesaid, if the serf be under his power, nevertheless it is not competent for any one of the people to raise the exception, unless he should have the right of objecting; or if it is competent to him and he raises the exception, it may be parried through a replication, either because it does not appertain to the objector to raise the exception, because he has no right, or if he had the right, it might be parried through a replication by him who has the right of making a replication; because as a person has no right of excepting, when he has no interest as being a stranger, so a replication will not appertain to the plaintiff, because a replication appertains to another person, and not to himself, and so it will have a place in the person of him, whose servant in truth has no interest in

locum habebit & tenebit exceptio versùs querentem, quia querens replicationem non habet, nec pertinet ad ipsum replicare, donec ad ipsum perventum fuerit, qui jus habet replicandi: verbi gratia, Servus alicujus sub potestate domini sui constitutus facit pquisitum de libero tenemento, forte ab alio quam â domino suo ejicitur, competit tamen extraneo exceptio de tenemento quod tenetur in villenagio, quia ad dominum pertinet actio, si servus ejiciatur, & non ad servum, quia servus non habet actionem. Item, esto quod servus extra potestatem domini constitutus perquisitum fecerit, priûs oportebit dominum disrationare servum, & tunc demum se ponere poterit in tenementum. Sed esto quod feoffator servi hoc non permiserit, sed se posuerit in seysinam, vel extraneus forte, quis habebit assisam novæ disseysinæ, vel dominus vel servus? Dominus non, quia nunquam seysinam habuit; si servus petere velit per assisam, obstabit ei exceptio villenagii. Sed revera quicquid dicatur, servus extra potestatem domini constitutus, cum sit in statu libero, contra dominum proprium habebit assisam, multo fortius in statu libero responsurus erit contra non dominum, qui nihil juris habet in persona servi: & sic si dominus non habuerit exceptionem servitutis, nec extraneus multo fortius. Si servus fuerit in statu libero, & ita in statu dubio, semper erit pro libertate judicandum, donec probetur in contrarium, & sic primò procedat assisa, quasi de libero tenemento, & postea
f. 192. agatur de statu, qui[1] prejudicialis est disseysina. Item qui tenet villenagium de domino suo, ejectus est a villenagio ab extranea persona cujus non interest, villanus queritur per assisam, extraneus opponit excep-

[1] "quia," MS. Rawl. C. 160.

it, and the exception will hold good against the plaintiff, because the plaintiff has no replication, nor does it appertain to him to make a replication, until it devolves upon him, who has the right of replication. For instance, the serf of a certain person established under the power of his lord makes the acquisition of a free tenement, and he is by chance ejected by some one else than the lord, nevertheless it is competent for the stranger to raise an exception against the tenement that it is held in villenage, because the action appertains to the lord, if the serf be ejected, and not to the serf, because the serf has no action. Likewise let it be that a serf established beyond the power of a lord has made a purchase, the lord must first derayne the serf, and then he may place himself into possession of the tenement. But let it be that the feoffor of the serf has not permitted this, but has put himself into seysine, or a stranger perhaps, who shall have an assise of novel disseysine, either the lord or the serf? Not the lord, because he never had seysine; if the serf wishes to claim by an assise, the exception of villenage will bar him. But in truth, whatever may be said, the serf established beyond the power of his lord, since he is in a free condition, will have an assise against his own lord, much more reasonably in a free state he will answer against one who is not his lord, who has no right over the person of the serf; and so if the lord has not an exception of serfage, neither has a stranger with much more reason. If a serf has been in a free state, and even in a doubtful state, it will have to be adjudged always in favour of liberty, until it be proved to the contrary, and so let the assise first proceed, as if concerning the free tenement, and afterwards concerning his *status*, because the disseysine is preliminary for judgment. Likewise he who holds a villenage from his own f. 192.
lord, if he be ejected from his villenage by a strange person, who has no interest in it, the villein complains by an assise, the stranger objects an exception of vil-

tionē villenagii, villanus replicat quod non pertinet ad extraneum excipere, quia suâ non interest: extraneus econtra, quod si ad eum non pertinet villenagii exceptio, ad villanum non ꝑtinet replicatio, sed ad dominū suum, & sic compensata hinc inde replicatione cum exceptione, remanebit extraneus in seysina, donec ille, scilicet verus dominus qui actionem habet & non servus, agat, petendo restitutionem per assisam. Et si sic extraneus excipiat, non eliditur exceptio sua per replicationem, quod nihil ad ipsum: quia quamvis exceptio ad ipsum non pertineat de jure, tamen locum habet contra villanum, quia villanus non habet actionem, non magis quam firmarius, qui alieno nomine tenet. Si autem servus perquisitum fecerit tenendum liberè de feoffatore suo, & dominus tenementum illud in manum suam non ceperit, tunc si extraneus eum ejiciat vel feoffator suus, & contra servum excipiat de villenagio, elidetur exceptio per replicationem, quia in hoc casu competit servo replicatio, scilicet quod ad alium non pertinet exceptio. Si autē ei, qui est extra potestatem domini sui, petenti restitutionem opponatur exceptio villenagii, non habebit locum exceptio, antequam corpus disrationetur in causa status, ut prædictum est, etiam si opponens parentes querentis ꝑducat ad exceptionem illam ꝑbandam: quia si ita, sequeretur quod causam status in judicium deduceret, & quia ita terminarentur simul tam causa status quam assisa (quod esse non debet) in personis eorum, qui extra potestatem fuerint dominorum in statu libero, & quasi sui juris. Si autem opponatur hujusmodi exceptio alicui qui fuerit sub potestate domini, si fuerit servus proprius, & ad exceptionem probandum producti fuerint parentes, qui eum servum ꝑbaverint, tunc locum habet, quod ꝑ hoc terminatur tam causa status quam assisa. Et talis liberabitur domino suo ut villanus. Et ꝑ hoc terminabitur utrumque. Illud idem erit, si villanus contendat se esse liberum sub potestate do-

leiny, the villein replies that it does not appertain to a stranger to except, because he has no interest in it; the stranger on the contrary [says], that if the exception of villenage does not appertain to him, the replication does not appertain to the villein but to the lord, and so the replication being balanced on either side with the exception, the stranger will remain in seysine, until he who is the true lord, who has the right of action, and not the serf, proceeds by claiming restitution by an assise. And so if a stranger except, his exception is not parried by a replication, that it does not concern him; because although an exception does not appertain to him of right, nevertheless it has a place against a villein, because a villein has no right of action, no more than a termor, who holds in another's name. But if a serf has made a purchase to be held by him freely from his feoffor, and his lord has not taken that tenement into his hand, then if a stranger should eject him, or his feoffor should do so and except against the serf on the ground of villenage, the exception will not hold good, before his body has been derayned in a cause of *status*, as said above, even if the objector should produce the parents of the plaintiff to prove that exception: because if it were so, he could bring a cause of *status* into judgment, and because in such manner as well a cause of *status* and an assise would be terminated simultaneously (which ought not to be), in the persons of those who are out of the power of their lords in a free condition, and as it were independent. But if an exception of this kind is raised against any one who has been under the power of a lord, if he has been his own serf, and his parents have been produced to prove the exception, who have proved him to be a serf, then it takes place that both the cause of *status* and the assise are thereby terminated. And such a person shall be delivered up to his lord as his serf. And thereby both shall be determined. The same thing shall take place, if a villein established under the power of a

mini constitutus, & ꝑquirat breve de servitiis & consuetudinibus, quod dominus ab eo non exigat &c. Et dominus opposuerit villenagium & parentes ꝓduxerit, utrūque placitum ꝑ hoc terminabitur, indirectè tamē. Idem erit, si cum villanus justificari non possit â domino suo quod ei faciat servitia, vel cum villanus breve de pace ꝑquisiverit cum sit sub potestate domini, & nullū breve p̃cessit de nativitate sua, & dominus sibi ꝑquisiverit breve q̃ faciat ei consuetudines & servitia, quæ ei facere debet de tenemento q̃ de eo tenet in villenagio, & parentes ꝓduxerit, & sic probaverit villenagium, utrumque terminabitur & indirectè, sive liber tenuerit villenagium sive villanus, & in hoc casu querens se ponat in assisam velit nolit, cum fuerit sub potestate dñi, alioquin denegetur ei actio, q̃ aliter esset, si esset extra potestatem. Si autē servo alieno bonâ fide possesso a possidente objiciatur hujusmodi exceptio, parentes non possunt ꝓduci, sed tamen standum erit præsumptioni, & tenet exceptio propter possessionem, donec ꝓbetur in contrarium, & possessus se probet liberum. Eodem modo si servo alieno bonâ
f. 192 b. fide possesso, semper stabitur hujusmodi exceptioni, donec verus dominus eum evincat, & si ille qui possidet aliquo casu parentes illius ꝓduxerit ad probādum, non valebit, quia ꝑ hoc non ꝓbabit illum esse servum suum, cum parentes sui sint servi alieni. Et ad ꝓbādam exceptionē villenagii, non oportet in aliquo casu ꝓducere parentes, sed sufficit ꝓbarē ꝑ assisam tantùm, quam si querens recusaverit, denegabitur ei actio sive querela, & si juratores malè juraverint, cōvincendi sunt ꝑ parentes ejus, qui fuerint sub potes-

lord shall contend that he is a free man, and shall obtain a writ of services and customs, that the lord shall not exact from him, &c. And the lord shall object his villenage and shall produce his parents, each plea shall be thereby determined, indirectly however. The same shall happen, if when a villein cannot be claimed of right by his lord that he should do him services, or when a villein shall obtain a writ concerning the peace, when he is under the power of his lord, and no writ of naifty has preceded, and the lord has obtained a writ that he shall perform for him customs and services, which he ought to perform for the tenement, which he holds from him in villenage, and has produced his parents and so has proved his villenage, both will be determined and indirectly, whether he held the villenage as a free man or as a villein, and in this case the plaintiff puts himself upon an assise, whether he will or not, since he is under the power of the lord, otherwise the action would be denied to him, which would be otherwise, if he were out of his power. But if against another man's serf possessed in good faith an exception of this kind be raised by the possessor, his parents cannot be produced, but weight must be given to the presumption, and the exception holds good on account of the possession, until it be proved to the contrary, and the person held in possession proves himself to be free. In the same manner if against another man's serf possessed in good faith, an exception of this kind will f. 192 b. always be upheld, until the true lord evicts him, and if he who possesses him in any case has produced his parents to prove it, it will not avail, because he cannot thereby prove him to be his serf, since the parents are the serfs of another person. And to prove an exception of villenage it is not necessary in any case to produce the parents, but it is sufficient to prove it by an assise only, which if the plaintiff shall refuse, an action or complaint shall be denied to him, and if the jurors have sworn badly, they are to be convicted by his parents, who have

tate domini. Item esto, q feoffator servum sub potestate existentem de tenemento q ei dedit libere tenendum ejecerit: tunc distinguendum erit utrum dominus servi tenementum illud in manum suā ceperit vel non. Si autē sic, tunc dominus habet assisam & actionem, & servus nullā, non magis quam de villenagio domini. Si autem non, tunc competit villano actio & hæredibus suis contra feoffatorē suum, & hæredes suos, & alios omnes qui ab eis causam traxerint, vel feoffamentum, ut si ipsi ꝑponant exceptionē villenagii contra talem, ipse habebit replicationem ex facto & feoffamento donatoris. Et ubi sequitur assisa novæ disseysinæ in ꝑsona antecessoris, sequitur assisa mortis antecessoris, in ꝑsona hæredis, non obstante exceptione villenagii, ꝑpter verum dominum villani. Eodem modo contra extraneos ad quos non ꝑtinet ejicere, & tamen villanus in hoc casu habeat actionem, & non dominus. Item esto q dominus servo suo sub potestate sua existenti terram dederit tenendā liberè sibi & hæredibus suis cum manumissione, licet servus ille villenagiū tenuerit, tamen ꝑpter manumissionem liber erit, ac sicut alius liber quilibet liberè tenebit, & quāvis tenuerit in villenagio, villenagium non aufert ei libertatem manumissionis. Et unde si dñs ipsum dejecerit, & ipse agat ꝑ assisam, si dñs excipiat de villenagio, ipse habet replicationem ex facto & manumissione domini sui. Et eodē modo de villenagio q tenet, potest villenagium derelinquere sicut alius liber. Eodem modo, si dñs ei manumisso faciat conventionē, habeat erga dñm suum actionē ex cōventione. Si autē servo do-

been under the power of his lord. Likewise let it be that the feoffor has ejected a serf being under his power from a tenement which he has given him as a freehold, then it is to be distinguished whether the lord of the serf has taken that tenement into his hand or not. But if so, then the lord has an assise and a right of action, and the serf none, no more than concerning a villenage of his lord. But if not, then the villein and his heirs have a right of action against his feoffor and his heirs, and all others who have derived from them a cause or a feoffment, as if they propound an exception of villenage against so-and-so, he will himself have a replication upon the act and the feoffment of the donor. And where an assise of novel disseysine in the person of an ancestor follows, an assise of the death of an ancestor will follow in the person of the heir, notwithstanding an exception of villenage on account of the true lord of the villein. In the same manner against strangers who have not the power to eject, and nevertheless the villein in this case has the right of action, and not the lord. Likewise let it be that a lord has given to his serf, being under his power, a ground to be held freely to him and his heirs with manumission, although that serf held a villenage, nevertheless he will be free on account of his manumission, and like any other free person will hold freely, and although he has held in villenage, the villenage does not take away from him his liberty of manumission. And hence if the lord has ejected him, and he proceeds by an assise, if the lord should except against him on the ground of villenage, he has a replication upon the fact and the manumission of his lord. And in the same way concerning the villenage which he holds, he may abandon the villenage, like any other free person. In the same way, if the lord has made a convention with him when manumitted, let him have his action against his lord upon the convention. But if he has made a dona-

nationē fecerit sine manumissione de aliqua terra tenenda p liberum servitium, talis donatio sive concessio non mutat statum suum servilē, quia ꝑsonę libere villenagium nihil aufert libertatis, nec liberum teñtum villano aliquid confert libertatis. Si autem dñs ita dederit sine manumissione, servo & hæredibus suis, teñdum liberè, p̃sumi poterit de hoc q̧ servum voluit esse liberum, cum aliter servus heredes habere nō possit nisi cum libertate, & ita cōtra dñm excipientē de villenagio cōpetit ei replicatio. Si autē cuicunq̃ in potestate alicujus existenti vel extra, sive exceptionē habeat ꝑpetuā vel privilegium, â quocunq̃ opponaī dño vel alio quocunq̃ feoffatore, vel extraneo, cujus nō interfuit, vel alio quocunq̃, & querens replicare noluerit contra tenentē, sed simpliciter dicat q̧ liber sit, & inde ponat se super juratā, & alius affirmet q̧ non, & inde se ponat similiter super juratā, absq̃ alia ꝑbatione ꝑducenda p parentes vel alio modo, cum sic agatur de cōsensu partium cadit assisa, nec est capienda ut assisa, sed vertitur in juratā, & fiat sacramentum, ita q̧ veritatem dicent de iis quæ ab eis exigentur ex parte dñi regis, quia non est actum in
f. 193. hoc casu principaliter de disseysina, utrū disseysitus fuerit vel nō: sed an talis sit an talis, s. liber vel servus, & sic ibi nulla erit cōvictio p assisam ꝑpter consensum, nec hujusmodi exceptio tangit assisam, cûm faciant sibi juratam quasi judicē ex consensu de statu: ut si dicant juratores q̧ servus sit, nihil capiet p assisam, si autem liber, tunc primò ꝑcedit assisa

tion to his serf without his manumission of any land to be held by free service, such a donation or grant does not change his servile state, because the villenage of a free person does not take away from him any liberty, nor does a free tenement confer any liberty upon a villein. But if the lord has so given it without manumission to a serf and his heirs, to be held freely, it may be presumed from this that he wished his serf to be free, since otherwise the serf will not be able to have heirs except with liberty, and thus he is entitled to a replication against his lord objecting on the ground of villenage. But if against any one being within the power of any one, or beyond it, whether he have a perpetual exception or privilege, it be objected by any lord, or any other feoffor, or a stranger who has no interest in the matter, or any other person whatsoever, and the plaintiff has been unwilling to bring a replication against the tenant, but simply says that he is free, and thereupon puts himself upon a jury, and the other affirms that he is not free, and thereupon puts himself in like manner upon a jury, without producing any other proof by parents or otherwise, when the proceeding is so conducted with the consent of the parties, the assise fails, nor is it to be taken as an assise, but it is turned into a jury, and let an oath be administered that they will say the truth concerning those things, which shall be required of them on the part of the lord the king, because the principal proceeding in this case is not concerning the disseysine, whether he has been disseysed or not, but whether he be of this condition or of that condition, whether he be a free man or a serf, and so there will be there no conviction by the assise on account of consent, nor does this kind of exception touch the assise, since they make for themselves the jury as it were judges by consent concerning *status:* as if the jurors should say that he is a serf, he will take nothing by the assise; but if they should say that he is free, then f. 193.

utrū disseysitus fuerit vel non, dum tamen eis prædicatur, quòd in hoc casu ad aliud remedium nō habebūt regressum, & ita p hoc terminabitur negotium quoad statu,[1] & nulli eorum quantûm ad exceptionē vel responsionē præjudicabitur, si postmodū de causa status agatur inter tales: quia si jurata dicat simpliciter quod querens villanus est, non erit ꝑpter hoc dño liberādus, nec ad villanum cōvictus, si fuerit extra potestatē, sed alia actione opus erit p breve de nativis, quia p juratā istā nihil aliud agitur, nisi quod â querela repellatur, & si sub potestate dñi fuerit constitutus ut servus, & jurata dicat ipsum esse liberum, quāvis recuperet per assisā, tamē corpus non liberatur â manibus dominorum, antequā p aliud breve se ꝑbet esse liberum, quîa exceptio villenagii opposita & sic probata, statum non mutat nec conditionem, sicut si ageretur de servitiis & cōsuetudinibus ubi probatur servitus indirectè. Si autem tenens dicat excipiendo quòd querens se cognovit ad villanum, tunc restat querendum â judice ubi, & ad villanum cujus? quia si non fuit villanus opponentis exceptionem non pertinet ad ipsum exceptio, sed ad eum cujus villanus esse dicitur, & sub cujus fuerit potestate, & domino suo cōpetit exceptio ex confessione sine alia probatione, nisi post confessionē illam statim[2] mutaverit per manumissionem, ex facto domini sui, vel feoffamentum, vel conventionem: quia in hoc casu etsi dominus habeat exceptionem justam, servus habet contra exceptionem justam replicationem. Et hæc vera sunt nisi sit aliquis qui dicat, quòd querens invitus & non

Britton, l. i. ch. xxxii. § 2.
Fleta, l.

[1] "statum," MS. Rawl. C. 160. | [2] "statum," id.

for the first time the assise proceeds, whether he has been disseysed or not, provided however it be told beforehand to them, that in this case they shall not have recourse to any other remedy, and so by this means shall be terminated the business as regards *status*, and no prejudice will be done to any of them as regards the exception or the answer, if afterwards in a cause of *status* proceedings take place between such persons, because if the jury say simply, that the plaintiff is a villein, he is not on that account to be delivered up to the lord, nor is he proved to be a villein, if he shall be beyond his power; but there will be need of another action by a writ of naifty, because by that jury nothing else has been done, except that he is repelled from his plaint, and if he is established under the power of the lord as a serf, and the jury say that he is free, although he should recover by the assise, nevertheless his body is not set free from the hands of the lord, before through another writ he shall prove himself to be free, because the exception of villenage having been raised and thus proved does not change his state nor his condition, as if the proceeding were concerning services and customs, where the servitude is proved indirectly. But if the tenant shall say in excepting, that the plaintiff has acknowledged himself to be a villein, then it remains to be inquired by the judge where and whose villein? Because if he is not the villein of the person who raises the exception, the exception does not appertain to him, but to him, whose villein he is said to be, and under whose power he may be; and his own lord is entitled to raise the exception upon his confession without any other proof, unless after that confession he has changed his *status* through manumission, by the act of his lord, or by a feoffment, or by a convention, because in this case although the lord may have a just exception, the serf has a replication to that exception. And these things are true, unless there is some one who says, that the

de consensu se ponat in assisam cûm habeat replicationem, & quòd aliter non sit audiendus. Si autem nulla facta exceptione villenagii vel proposita alia, quare assisa debet remanere, & procedet[1] assisa in modum assisæ, & assisa ita dicat simpliciter quod querens liberum tenementum habere non possit, quia villanus est, vel e contrariò, scilicet quod liber sit; si justiciarius sine aliqua examinatione secundùm dicta juratorum (quod esse non deberet) judicaverit, si postmodum per parentes vel alio modo probetur contrarium, juratores de pjurio convincentur. Item esto, quod ille cui villenagium opponitur sit persona penitus incognita, ita q juratoribus nihil constet de conditione, utrum liber sit an servus, in hoc dubio erit pro libertate judicandum, ita q in benigniorem partem cadet interpretatio, sicut de quolibet homine præsumitur, quod sit bonus homo, donec probetur in contrarium, & etiam quia opponens exceptionem de villenagio non probat eam: est igitur quasi nulla, cùm nō sit probata, licet revera talis sit, secundùm quod proponitur. Jus enim nūquam deficit, licet deficiat probatio. Item esto q servus alienus sub potestate alterius quàm domini sui constitutus pquisitum fecerit & â vero dño ejiciatur anteq illā recuperaverit, recuperabit servus per assisam erga verum dominum suum, nō obstāte exceptione villenagii, secundū quod terra illa capta fuerit in manū
f. 193 b. ejus, sub cujus potestate fuerit vel non, & secundum hoc competit assisa uni eorum vel alteri. Item esto quod quis servum alienum, & in potestate domini sui existentem feoffaverit, tenendum de domino suo liberè, si dominus hoc voluerit, & homagium servi sui recepe-

[1] "procedat," MS. Rawl. C. 160.

plaintiff unwillingly, not with his consent, puts himself on an assise, when he has a replication, and that otherwise he is not to be heard. But if no exception of villenage having been raised, nor any other exception having been propounded, why the assise ought to remain, and the assise shall proceed after the manner of an assise, and the assise shall say simply that the plaintiff cannot have a free tenement because he is a villein, or on the contrary, for instance, that he is a free man; if the justiciary without any examination has judged according to the sayings of the jurors (which ought not to be), if afterwards the contrary be proved by the parents or in some other way, the jurors shall be convicted of perjury. Likewise let it be, that he against whom villenage is objected is a person altogether unknown, so that the jurors have no certainty as to his condition, whether he is free or a serf, in this doubtful state judgment is to be given in favour of liberty, so that the interpretation shall incline to the more merciful side, just as it is presumed respecting every person that he is a good man, until the contrary is proved, and also when he who raises the exception of villenage does not prove it: it is therefore a nullity since it is not proved, although in truth it may be so according as it has been propounded. For right never fails, although the proof may fail. Likewise let it be that another person's serf established under the power of another than his own lord has made an acquisition, and is ejected by the true lord before he has recovered it, the serf shall recover by an assise against his true lord, notwithstanding the exception of villenage, according as that land has been taken into the hand of him under whose power he may be or not, and f. 193
according to this the one or the other of them is entitled to an assise. Likewise let it be that a person has enfeoffed another person's serf, and one who is in the power of his lord, to be held freely of his own lord, if the lord is willing and has received the homage of his

rit, si eum ejiciat, servus per assisam recuperabit, non obstante villenagio, sed in voluntate domini erit, utrum hoc facere voluerit, vel tenementum illud in manum suam capere. Item si servus sibi ipsi acquisiverit & non domino, dominus servi non efficietur dominus rei, antequam illam ceperit in manum suam, & competit servo assisa contra omnes, præterquam contra verum dominū suū in cujus fuerit potestate, nō obstāte exceptione villenagii. Si autem acquisierit ad opus dominorum & nomine ipsorum, unius vel plurium, vel uni ex pluribus, eis competit assisa quorum nomine acquisivit, quia ex facto servi sunt in possessione, licet non ceperint in manum suam cum solennitate. Item si in modum exceptionis hoc modo opponatur villenagium â tenente, s. quod querens assisam portare non possit, quia villanus est & filius villani, poterit utrumq; esse verum, & quòd ille querens habeat contra istam exceptionem justam replicationē, & q cadet assisa, vel procedet, de utroq; istorum, vel de altero, vel de neutro, nō cadet assisa si querens non replicaverit vel exceperit, quia neutrum istorum habet, nec replicationē nec exceptionem, quia villanus est sub potestate domini sui constitutus, & natus de villano & villana ipsius domini sui. Eodē modo de patre suo, & sic si replicet vel excipiat, p assisam veritas declarabitur, & secundum hoc locum habebit replicatio vel non habebit. Et si assisa faciat cōtra ipsum, cadat de utroq;. Item potest esse quod cadat de uno & nō de alio, quia benè potest esse q ipse villanus sit & pater suus liber, sed ipse habet exceptionem pro se & forte privilegium, & ideo per hoc se defendit contra exceptionem. Item

serf, if he shall eject him, the serf shall recover by an assise, notwithstanding his villenage, but it shall be at the will of the lord, whether he wishes to do this or not, or to take that tenement into his hand. Likewise if the serf has purchased for himself, and not for his lord, the lord of the serf will not be rendered lord of the thing, before he has taken it into his hand, and the serf is entitled to an assise against all persons except against his true lord, in whose power he shall be, notwithstanding the exception of villenage. But if he has acquired for the use of the lords and in their names, one or more, or one out of several, those in whose name he has acquired it are entitled to an assise, because in fact they are serfs in possession, although they have not taken the thing into their hand with solemnity. Likewise if after the manner of an exception villenage be objected in this manner by the tenant, to wit, that the plaintiff cannot bring an assise because he is a villein and the son of a villein, both may be true, both that the plaintiff has a just replication against that assise, and that the assise will be barred or will proceed concerning both of these objections, or concerning one or concerning neither, the assise will not be barred if the plaintiff has not replied nor excepted, because he has neither of them, neither a replication nor an exception, because he is a villein established under the power of his lord, and is born of a father and mother, who were villeins of the lord himself. In the same way concerning his father, and so if he replies or excepts, the truth shall be declared by an assise, and according to this a replication will have a place or not. And if the assise makes against him, let him be cast in both. Likewise it is possible that he should be cast in one and not in the other, for it may well be that he is himself a villein and his father was free, but he has an exception on his own behalf and by chance a privilege, and accordingly he may by this defend himself against the exception. Like-

potest esse q liber sit & pater suus villan^{9}, q̃a ipse p̱genitus ex libera & soluta ex patre villano, quo casu sequi debet conditionem matris. Item vice versa, potest esse q ipse sit villanus & pater liber, quia progenitus ex villana & libero in matrimonio sive cōtubernio, & in quo casu sequetur conditionē̃ matris, maximè si liber ingressus sit in villenagium ad nativam, secus erit si extra villenagium, quia thorus mariti liberi facit eam liberam in vita viri; et quia si in servitutem peteretur, defenderet se contra exceptionem villenagii p̱ replicationem liberi thori. Item si sic objiciatur villenagium quod villanus sit, quia pater suus villanus fuit, tunc considerare oportet utrum matrimonium intervenit vel non, sicut p̃dictum est, & in quo statu talis pater obiit, utrum in statu libero, s. ita quod peti non possit[1] sine brevi, quamvis fugitivus vel alius servus; vel in statu servili, liber vel alius sub potestate alicujus constitutus vel detentus, & secundum talem statum erit exceptio villenagii judicanda. Et ideo sive pater liber sit sive servus tempore mortis, vel in statu libero vel servili, erit exceptio villenagii judicanda, & hoc ita, nisi in filio sit status patris immutatus. Sed dici posset forte ab aliquo, quod de statu defuncti post mortem agi non potest, utrum liber sit sive bastardus. Verum est, quod ad hoc agi non potest, quod mortuus ad villanum probetur, quia hoc esset in principali casu status, ad pro-
f. 194. bandum talem p̱ testes & parentes, & ita mutare statum defuncti. Poterit tamen inquiri p̱ juratam utrum

[1] "posset," MS. Rawl. C. 160.

wise it may be, that he is himself free, and that his father was a villein, because he was himself born of a mother who was free and unmarried by a villein father, in which case he ought to follow the condition of the mother. Likewise conversely it may be, that he is a villein and his father was a free man, as having been born out of a villein woman by a free man in matrimony or in cohabitation, and in which case he follows the condition of the mother, more particularly if the free man has entered into the villenage to a naif woman, it will be otherwise if beyond the villenage, because the bed of a free husband makes her a free woman during the life of the man, and because if he were claimed into serfdom, he would defend himself against the exception of villenage by the replication of a free marriage bed. Likewise if villenage should be objected to him that he is a villein, because his father was a villein, then we must consider whether matrimony has intervened or not, as is above said, and in what condition his father died, whether in a free condition, that is, that he could not be claimed without a writ, although a fugitive and the serf of another; or in a servile state, free or another's serf, established or detained under the power of another, and according to such state the exception of villenage will have to be adjudicated. And accordingly whether the father is free or a serf at the time of his death, or in a free or in a servile state, the exception of villenage will have to be adjudicated, and this so, unless the condition of the father has been changed in the son. But it may be said perhaps by some one, that a question cannot be raised respecting the condition of the deceased person after his death, whether he be free or a bastard. It is true that an action cannot be brought in order to prove a dead man to be a villein, for this would be in a principal case of *status* to prove such an one by witnesses and parents, and so to change the *status* of the deceased. An inquest, however, may be made by a jury whether f. 194.

ipse villanus obiit vel liber, vel bastardus fuit statu non mutato, quia villenagium oppositum in modum exceptionis, statum defuncti vel vivi non alterat nec mutat. Et longè aliud est ꝑbare ꝑ testes & parentes quod ita esse debeat, ubi sit aliquis qui respondere posset ad proposita, quam inquirere ꝑ juratam simpliciter si ita fuit; & hæc vera sunt, etiam si revera pater villanus fuit & in judicio petitus ut villanus ꝑ breve, & in statu libero se defendit usquè ad mortem. Et idem erit, si extra potestatem domini constitutus nunquam in vita petitus esset, statu enim liber est, quicunque extra potestatem domini sui constitutus sine placito & brevi in servitutem revocari non possit. Et eodem modo statu servus erit liber homo in possessione servitutis constitutus, ita quod ad libertatem ꝑvenire non possit sine placito, & in tali statu obierit, sive in vita sua in libertatem proclamaverit sive non.

Cap. XXII.

1. De casibus quibusdam specialibus tangentibus materiam prædictam.

Dictum est supra in genere, qualiter opponenda est exceptio servitutis & cui competat. Nunc autem fit descensus ad casus speciales. Esto igitur quod liber homo ingrediatur in villenagium ad ancillam villanam, non propter hoc mutatur status ejus, sed in parte obumbratur, cùm propter villanam, quæ est quasi terminus copulans, recedere non possit à villenagio, oportebit eum facere villanas consuetudines, non tamen ratione personæ, sed ratione villenagii, quia per hoc non mutatur status nequè conditio liberæ personæ. Sed esto quod ambo sunt fugitivi, scilicet vir & uxor

he died a villein or free, or was a bastard, his status not having been changed, because villenage objected in the way of an exception does not alter nor change the status of a deceased or living person. And it is far different to prove by witnesses and parents that it ought to be so, where there is any one who can answer the questions proposed, than to inquire by a jury simply, if it was so; and these things are true, even if in reality the father has been a villein, and has been claimed in a judgment as a villein by a writ, and has maintained himself in a free condition, down to his death. And it will be the same if, being established beyond the power of his lord, he has never been claimed in his lifetime, for he is of a free condition, whosoever being established beyond the power of his lord cannot be recalled into serfdom without a plea and a writ. And in a similar manner a free man established in the possession of serfdom will be of a servile condition, so that he cannot attain to freedom without a plea, and he will have died in that state, whether during his lifetime he has made claim to freedom or not.

Chapter XXII.

1. Of certain special cases touching the preceding matter.

We have spoken above generally in what way an exception of serfdom is to be raised, and who is entitled to it. Now indeed we will descend to special cases. Let it be supposed then that a free man enters into a villenage to cohabit with a single woman of villein condition, his condition is not changed on that account, but it is partially obscured, since on account of the villein woman, who is as it were a conjunctive term, he cannot withdraw from the villenage, he will be bound to perform villein usages, not by reason of his person but by reason of the villenage, since neither the state nor the condition of a free person is on that account altered. But let it be that both are fugitives, to wit, the man

uxor petatur & revocetur in servitutem, & vir uxorem sequatur: sive vice versa. Esto quod villanus extra potestatem domini sui copuletur liberæ liberum tenementum habenti, si dominus servi utrumq; ejiciat, tam virum quàm uxorem, quæritur an recuperare debeant non obstāte exceptione villenagii, verius est quod sic, ratione supradicta, donec servus in servitutem revocetur. Sed quid dicendum est de uxore & libero tenemento, si dominus se posuerit in tenementum uxoris, cum p se petere non possit sine viro, si autem vir adjungatur, obstabit exceptio, quid ergo erit? Videtur quod dominus retinebit quamdiu villanus vixerit, & post mortem villani uxor remedium habebit, quasi sublato impedimento, sed revera recuperabit præoptenta, sed petere non posset adipiscenda. Item domino exceptionem villenagii opponenti, responderi poterit & contra ipsum replicari multis modis. Poterit enim replicari, q dominus in curia regis recognovit ipsum esse liberū & remisit ei totum jus & clameum q habuit vel habere potuit in ipso & in tota sequela sua, & inde proferat cyrographū in curia domini regis confectum, quod si habuerit vel non, & recognitio irrotulata fuerit, vocet rotulos ad warantum, & hoc ubi dominus vexaverit eum in curia, & eum petiit ut villanum. Item eodem modo, si dñs eum aliquando ꝑduxit in curia dñi regis ut liberum hominē suum ad disrationādū, vel legem aliquā faciendā vel purgationē, quod de facili sciri poterit ꝑ rotulos. Et eodem modo, si hoc fecerit in coñ, quod etiam sciri poterit ꝑ recorda coñ.

f. 194 b. Item si dominus cum manumisit & feoffavit de libero

and his wife, let the wife be claimed and recalled into serfdom, and let the husband follow his wife, or vice versâ. Let it be that a villein beyond the power of his lord cohabits with a free woman having a free tenement, if the lord of the serf should eject both, the husband as well as the wife, it is asked whether they ought to recover notwithstanding the exception of villenage, truth inclines to the affirmative, for the reason above said, until the serf is recalled into serfdom. But what is to be said concerning the wife and the free tenement, if the lord has put himself into possession of the tenement of the wife, since she cannot claim it alone without her husband, but if the husband be joined to her, an exception will be in the way, what then will it be? It seems that the lord will retain it as long as the villein is alive, and after the death of the villein the wife will have a remedy as if an impediment had been removed, but he will recover indeed what has been previously received, but he could not claim what is to be received. Likewise to the lord raising the objection of villenage an answer may be given and a replication against himself in many ways. For it may be said by way of replication that the lord in the king's court has recognised him to be free, and has remitted to him all the right and claim which he had or might have over him and over all his following, and let him produce a chirograph made in the court of the lord the king, which if he shall have or not, and the recognition has been enrolled, let him call the rolls to warrant him, and this where the lord has harassed him in court and has claimed him as his villein. Likewise in the same way, if the lord has once produced him in the court of the lord the king as his free man to derayne or to prove his law, or as a compurgator, which can easily be known by the rolls. And in the same way, if he has done this in a county, which may be known by the record of the county. Likewise if the lord has f. 194 b.

tenemento, & sic recuperabit seysinam manumissus non obstante exceptione villenagii contra eum qui manumisit & hæredes suos, ut inter Thomam Veteris Pontis, & Richardum, & alios quoscunq; ei succedentes ex quacunq; causa, cùm nihil amplius exigere possunt quam ille potuit cui succedunt. Eodē modo dicendum, si quis manumissus fuerit etiam sine libera terra. Item si fiat quod tantundem valet, ut si dominus feoffaverit servum suum etiā sine libertate expressa, tenēdum sibi & hæredibus suis p liberum servitium, quia ex quo mentionem facit de hæredibus, præsumitur vehemēter quod dominus voluit servum suum esse liberum, quod quidem non esset, si de hæredibus mentionem non faceret. Itē idē erit si dominus aliquando petiit eum ut nativum suum, & ipse p parentes vel alio modo probaverit se esse liberum, & aliæ infinitæ possunt esse responsiones, sicut exceptio rei judicatæ, & replicationes contra dominum. Si autem dominus sic dicat & excipiat contra petentem restitutionē p assisam, & adjiciat quod villanus sit, vel filius villani vel villanæ, ad hoc, quod dicit q filius villani vel villanæ, replicare poterit, quod licet pater suus villanus esset, mater tamen sua libera fuit & soluta, & ideo sequi debet conditionem matris & non patris. Ad hoc autem quod dicitur quod mater sua fuit villana, replicari poterit, quod quamvis villana, copulata fuit libero homini in libero tenemēto, & ipse genitus in libero thoro, ꝑpter quod sequi debet conditionem patris & non matris. Item replicari potest contra dominum excipientem in villenagio, quod quamvis utrumque habeat villanum

manumitted him and enfeoffed him with a free tenement, and so the manumitted person shall recover seysine, notwithstanding the exception of villenage, against him who has manumitted him and against his heirs, as between Thomas Vieux Pont and Richard, and others whomsoever succeeding to him from whatever cause, since they cannot exact any thing more than he could to whom they succeed. In the same way it is to be laid down, if anybody has been manumitted without a free tenement. If a thing be done which is equivalent, as if a lord has enfeoffed his serf even without express liberty to hold to himself and his heirs by free service, because since he has made mention of heirs, it is a forcible presumption that the lord wishes his serf to be free, which would not be the case if he made no mention of heirs. Likewise it will be the same if the lord has once claimed him as his naif, and he himself by his parents or in some other way has proved himself to be free, and other infinite answers may be made, as an exception of a judgment already given, and replications against the lord. But if the lord says so and excepts against a person claiming restitution by an assise and should add that he is a villein, or the son of a villein father or a villein mother, against this which he says that he is the son of a villein father or a villein mother, he may reply that, although his father was a villein, his mother was free and independent, and accordingly he ought to follow the condition of his mother, and not of his father. Against this however that it is said that his mother was a villein, it may be replied, that although she was a villein, she was cohabiting with a free man in a free tenement, and he was himself begotten in a free bed, wherefore he ought to follow the condition of his father and not that of his mother. Likewise it may be replied against a lord excepting on the ground of villenage, that although he had both a father and mother who were villeins coha-

tam patrem q̃ matrem copulatos, & quamvis sit in villenagio genitus, quod ad dominum nō ꝑtinet exceptio: ut si villanus alicujus in alterius villenagium ingressus, vel villana e contrario in alterius villenagium ad villanum, non habet aliquis exceptionē villenagii contra talem, si feoffatus fuerit tenendi liberè, nisi ille in cujus villenagio genitus fuit & natus: maximè si fuerit sub ejus potestate constitutus. Item cùm servus replicaverit contra dominum de manumissione, dominus potest triplicare versus ipsum, quòd manumissio non fuit sufficiens nec perfecta. Sed hæc triplicatio locū habet in hærede manumissoris, & nō in ipso manumissore. Quià esto quod servus velit manumitti, & cùm nihil habeat proprium, eligat fidem alicujus, qui eum emat quasi propriis denariis suis, ꝑ talē emptionem non consequitur emptus aliquam libertatem, nisi tantum quod mutat dominiū in re empta, inprimis solvi debet pretium, postea sequitur traditio rei. Solvitur hic preciū pro nativo, sed nulla subsequetur[1] traditio, sed semper manet in villenagio quo prius. Si tenens tenementum acquirat tenendū liberè, & hæres manumissoris vel alius successor eum ejiciat, si petat per assisam & hæres opponat villenagium, & villanus replicet de manumissione & emptione, hæres triplicare poterit q̃ imperfecta fuit emptio sive manumissio, eo quod nunquā in vita venditoris subsecuta fuit traditio, & ita talis semp remanebit sub potestate hæredis, nec valebit eis in hoc casu instrumētū manumissionis, quod quidē si in judicio ꝑferatur magis nocere possit quàm prodesse. Et notādū, quod ita excipere poterit tenēs cōtra querentē,[2] quod querēs

[1] "subsequitur," MS. Rawl. C. 160.

[2] "excipi poterit contra querentem," *id.*

biting together, and although he was begotten in villenage, that exception does not pertain to the lord; as if the villein of one person having entered into the villenage of another person, or a villein woman on the contrary having entered into the villenage of another lord (to cohabit with) a villein, a person cannot make an exception of villenage against such a person, if he has been enfeoffed to hold freely, excepting the lord in whose villenage he has been begotten and born: particularly if he has been established under his power. Likewise when the servant has replied against the lord on the ground of manumission, the lord may rejoin against him, that the manumission was not sufficient nor perfect. But this rejoinder has place against the heir of the manumittor, and not in the case of the manumittor himself. Because let it be the case that the serf wishes to be manumitted, and since he has nothing of his own, he elects the credit of some one, who buys him as it were with his own money, the person so bought does not acquire by such a purchase any liberty, except so far that he changes the dominion in the thing bought. In the first place the price ought to be paid, afterwards the delivery of the thing follows. Here a price is paid for a naif, but no delivery will follow, but he always remains in the same villenage as before. If the tenant acquires the tenement to be held freely, and the heir of the manumittor or another successor eject him, if he claims by an assise and the heir objects villenage and the villein replies on the ground of manumission and purchase, the heir may rejoin that the purchase or the manumission was imperfect, on this ground that delivery never followed in the life of the vendor, and so he will always remain under the power of the heir, nor will the instrument of manumission avail them in this case, which indeed if it be produced in judgment may do more harm than benefit. And it is to be noted that the tenant may always except against the claimant, that the claimant

f. 195. Britton, i. ch. xxxii. Fleta, 193.

semper onerabitur probatione, & sic replicari contra exceptionem a querēte, quod replicationem opponens onerabitur probatione vice versa: & ista sufficiāt in prædictis, exēpli causa, sed aliquid dicetur inferiùs de casibus specialibus. Item objici poterit villenagium in modum exceptionis cum adjectione tali, scilicet quod querens liberum tenemētum habere non possit, quia villanus est, & ita villanus, quòd filiam suam maritare non potest sine mercheto ad plus vel ad minus pro voluntate domini, & alias objectiones objicere poterit, per quas verisimile est q̄ villanus sit. Et unde oportebit quod veritas inquiratur per modum juratæ & nō in modum assisæ, si utraq̄ pars de communi consensu se posuerit in juratā, ut inter placita quæ sequūtur regem de assisis captis apud Norwich coram rege, anno regni sui vicesimo tertio. Assisa novæ disseysinæ, si Wilhelmus Bicard.[1] Item objici poterit exceptio villenagii in hūc modum, quod querens villanus sit & teneat in villenagio: ut in eodem rotulo coram ipso rege. Assisa novæ disseysinæ, si Richardus de Merlay. Item objici poterit in tali adjectione, quod non potest pullum suum masculū vendere nec bovem, sine licentia domini. Item possunt omnes istæ objectiones & plures simul & semel & aliæ plures opponi contra querentem, & de quibus omnibus poterit inquiri veritas per juratā & non in modum assisæ, excepto eo, quod si objiciatur exceptio villenagii cum tali adjectione inter alias, quod non possit maritare filiam suam sine mercheto certo vel incerto, talis adjectio nunquam locum habebit in persona liberi, licet teneat per villanas consue-

[1] "Byard," MS. Rawl. C. 160.

shall always have the burden of the proof, and so it may be replied by the claimant against an exception, that he who raises the exception shall be burdened with the proof of it conversely: and let these things suffice in the matter aforesaid for the purpose of example, but something shall be said below concerning special cases. Likewise villenage may be objected in the way of an exception with an addition of this kind, to wit, that the claimant cannot have a free tenement, because he is a villein, and so entirely a villein, that he cannot give his daughter in marriage without redemption of blood at a higher or lower price according to the will of the lord, and he may oppose other objection, by reason whereof it is probable that he is a villein. And hence it will be incumbent that the truth be inquired into by means of a jury, and not after the manner of an assise, if both parties by common consent place themselves on a jury, as amongst the pleas which follow the king concerning the assises held at Norwich before the king in the twenty-third year of his reign. An assise of novel disseysine if William Bicard. Likewise an exception of villenage may be taken in this manner, that the claimant is a villein and holds in villenage, as in the same roll before the king himself, an assise of novel disseysine, if Richard de Merlay. Likewise it may be objected in such an addition, that he cannot sell his male colt nor his ox without the license of his lord. Likewise all these objections and more, together and separately, and many others may be raised against a claimant, and concerning all of which the truth may be inquired into by a jury, and not after the manner of an assise, with this exception, that if an exception of villenage be raised with this addition amongst others, that he cannot give his daughter away in marriage without a redemption of blood either for a certain or uncertain sum, such an addition shall not take place in the person of a free man, although he holds by villein customs, unless he has f. 195.

tudines, nisi se ad hoc specialiter obligaverit, vel nisi se copulaverit villanæ in villenagio, propter jura libertatis, quia, quamvis teneat in villenagio, tamen sui juris est ut liber homo, nec sanguinem suum nec carnem (licet in villenagio tenuerit) subjicit servituti: de servo autem hoc intelligendum erit, qui sui potestatem non habet, sed dominus. Si autem contra prædictas rationes aliquid statuatur, non erit hoc pro judicio vel jure observandum, quia potius error dici possit quàm veritas, corruptela quàm consuetudo: ut si quis cognoverit se aliquando fuisse villanum sed manumissum, non recuperabit liberum tenementū per assisā, licet proferat chartam manumissionis: ut inter placita quæ sequuntur regem anno regni sui vicesimo tertio in comitatu Suff. Assisa novæ disseysinæ, si Radulphus filius Roberti. Sed hoc salvari poterit, ubi quis servum suum alicui vendiderit pro denariis, & ubi venditus servus nunquam liberatus fuit emptori in vita vēditoris vel emptoris, & qui si liberatus esset, propter hoc non mutat statum, licet mutaverit dominum. Item si hujusmodi manumissus prolem suscitaverit, quamvis ex libera hæreditatem habente, si post mortem matris ejiciatur, non recuperabit per assisam liberum tenementum, non magis quam villanus, ut inter placita quæ seqnuntur regē H., anno vicesimo primo in comitatu Eborum. Assisa novæ disseysinæ, si Wilhelmus de Stocbrige. Item mulier libera habens hæreditatem, cùm fuerit villano copulata & ambo ejecti fuerint, non recuperabit, quamdiu villanus vixerit, ut inter placita quæ sequuntur regem anno vicesimo, assisa novæ disseysinæ de Waltero de Emdene & Alicia filia Ernaldi in comitatu Buck., sed contra.

specially bound himself to it, or unless he has coupled himself to a villein woman in a villenage, on account of the rights of freedom, because although he holds in villenage, nevertheless he is independent as a free man, nor does he subject his flesh and blood to servitude (although he holds in villenage): but this must be understood in the case of a serf who has no power over himself, but his lord has. But if anything be settled contrary to these reasons, it will not have to be observed as a judgment or as a right, because it may be called error rather than truth, a corruption rather than a custom; as if any one has acknowledged himself to have been a villein but manumitted, he shall not recover a free tenement by an assise, although he should produce the charter of his manumission: as amongst the pleas which follow the king in the twenty-third year of his reign in the county of Suffolk. An assise of novel disseysine, if Randulph Robertson. But this may be reserved where a person has sold his serf to another for money, and the sold serf was never delivered to the purchaser in the lifetime of the vendor or purchaser, and who if he had been delivered, would not therefore change his state, although he had changed his lord. Likewise if a person of this kind having been manumitted has raised offspring, although by a free woman having an inheritance, if he be ejected after the death of the mother, he shall not recover the freehold by an assise, any more than a villein, as amongst the pleas which follow the king in the twenty-first year of his reign in the county of York. An assise of novel disseysine, if William of Stockbridge. Likewise a woman having an inheritance, when she has been coupled to a villein, and both have been ejected, shall not recover [by an assise] as long as the villein lives, as amongst the pleas which follow the king in the twentieth year, an assise of novel disseysine concerning Walter de Emden and Alicia daughter of Ernald in the county of Buckingham, but the contrary.

f. 195 b.

Cap. XXIII.

1. Quis injuste possidet, et quis non.

Et generaliter notandum, quod cùm quis queratur se esse injuste disseysitum, bene poterit esse quod nunquam fuit in seysina, & ex hoc habebit tenens exceptionem, & veritas inquiratur per assisam. Item si fuit in seysina, hoc potuit esse quod non nomine ꝑprio sed alieno, ut ꝑcurator, firmarius, servus & hujusmodi. Item si nomine ꝑprio & non alieno, poterit esse in seysina juste vel injuste: juste, ut si nomine proprio & in re propria, & in feodo, vel ad vitam, vel ꝑ judicium, talibus ritè competit assisa novæ disseysinæ. Item injustè, ut si ꝑ disseysinam vel intrusionem: unde, ut sciatur quis justè fuerit disseysitus vel injustè, oportet videre q̃s prius fuit in seysina justè vel injustè, secundùm quòd res fuerit propria vel aliena. Habere poterit quis seysinam corpore & animo proprio, & corpore & animo alieno, & acquirere rem, & sciens & ignorans, absens sicut præsens, & dormiens sicut vigilans, ut alibi pleniùs. Sed tamen justè quantum ad illum qui jus habet, sed injustè quantum ad illum qui jus non habet. Et sciendum, quòd justè possidet quantum ad omnes, qui suo jure utitur, quoad hoc quòd restitutionem habeat suo jure, ut si in feodo vel ad vitam quocunq; titulo, talis, si feoffatus fuerit & ejectus sine judicio & injustè, recuperabit seysinam, quia fuit juste in seysina nomine proprio. Et competit assisa novæ disseysinæ in hoc casu, tam servo quam libero, quia servus habere poterit liberum tenementum in suo casu. Item poterit quis justè possidere nomine proprio quoad usum fructum, & non quoad liberum tenementum, sicut fructuarius & usuarius, & qui ad voluntа-

Chapter XXIII.

f. 195 b.

1. Who possesses unjustly, and who not.

And it is to be generally noted, that when a person complains that he has been unjustly disseysed, it may well be that he never was in seysine, and the tenant will on this ground have an exception, and the truth may be inquired into by an assise. Likewise if he was in seysine, it may have been that he was so not in his own name, but in another's, as agent, a termor, a serf, or otherwise. Likewise if he be in seysine in his own name and not in another's, he may have been justly or unjustly so; justly if in his own name, and in his own realty, and in fee, or for life, or by a judgment, such persons are duly entitled to an assise of novel disseysine. Likewise unjustly as if by a disseysine or an intrusion, whence, in order that it should be ascertained who has been justly or unjustly disseysed, it is incumbent to see who was first in seysine justly or unjustly, according as the thing was his own or another's. A person may have seysine with his own body and with his own intention, and with another person's body and intention, and may acquire a thing, both knowingly and unknowingly, absent just as present, and sleeping just as waking, as elsewhere more fully. But justly as regards him who has right, and unjustly as regards him who has no right. And it is to be known, that he possesses justly against all persons, who uses his own right, so far that he has restitution of his own right, as if in a fee or for life by whatever title, such a person, if he be enfeoffed and be ejected without a judgment and unjustly, shall recover seysine, because he was justly in seysine in his own name. And an assise of novel disseysine is applicable in this case, as well for the serf as for the free person, because the serf can have a freehold in his own case. Likewise a person may justly possess in his own name as regards the usufruct, and not as regards the freehold, as a person entitled to the fruits and the use, and

tem tenuerit: sed talibus non competit assisa, sed ꝑprietariis cōpetit assisa de libero tenemēto per breve de disseysina. Sed tamen per aliud breve terminus restituatur, & hoc de re propria, & ita possidet quis justè rem propriam. Item rem alienā potest quis justè] possidere, ut si quis ex aliqua causa acquisitionis justè, sicut ex causa donationis vel venditionis, fuerit in seysina, sicut per nō dñum, juste possidet & injuste, sed tamen secundùm diversos respectus: juste, quantū ad feoffatorem suum & alios omnes qui jus non habēt, injuste tātùm, quantùm ad ipsum qui jus habet, s. verum dñum. Itē injuste poterit possidere quis quantùm ad verum dñum, quem injuste & sine judicio disseysivit, vel cujus tenemētum ingressus est ꝑ intrusionem vel disseysinam, & juste quantū ad omnes qui jus non habēt neq; actionē, sive servus sit qui fecit disseysinā vel intrusionē sive liber, quia si ab illis disseysitus fuit, qui jus non habent, recuperabit incontinēti ꝑ assisam, sed quantū ad verum dñum, si recēter ejectus fuerit, nō recuperabit. Si autem post tempus, cùm per negligentiam disseysiti tanto tempore fuerit in seysina, quod sine judicio ejici non possit, contra verum dñum recuperabit, quia sine judicio. Et multo fortius videtur, quod recuperare debeat versus eos qui nihil juris habent, cùm possit versus eū qui jus habet, & ita acquirit quis sibi causam & titulum possidēdi ex tem-
f. 196. pore, & per negligentiā disseysiti. Et qualitercunq; quis fuerit in possessione, nomine proprio de re propria, vel aliena per disseysinam, vel ꝑ intrusionē, & sic juste vel injuste, eo solo quòd est in possessione, plus juris habet in re possessa q̄ ille qui est extra possessionem

one who holds at will; but such persons are not entitled to an assise, but the proprietors may have an assise concerning the freehold by a writ of disseysine. Nevertheless by another writ the term may be restored, and this concerning one's own thing, and thus a person possesses justly his own thing. Likewise a person may justly possess another person's property, as if any one from any cause of acquisition, as from a cause of donation or of sale, is justly in seysine as through one who is not the lord, he possesses justly and unjustly, but in different respects; justly as regards his feoffor and all others who have no right, unjustly only as regards him who has the right, that is, the true lord. Likewise a person may unjustly possess as regards the true lord, whom he has unjustly and without a judgment disseysed, or whose tenement he has entered by intrusion or disseysine, and justly as regards all who have no right nor action, whether it be a serf or a free man, who has made the disseysine or intrusion, because if he has been disseysed by those who have no right, he shall forthwith recover by an assise, but as regards the true lord, if he has been recently ejected, he shall not recover. But if after a time, when through the negligence of the party disseysed he has been for so long a time in seysine that he cannot be ejected without a judgment, he shall recover against the true lord, because it is done without a judgment. And much stronger seems to be the case, that he ought to recover against those who have no right, since he can recover against him who has right, and thus a person acquires for himself a cause and a title of possession from time and through the negligence of the party disseysed. And in whatever manner a person may have f. 196.
been in possession in his own name of his own property or of another person's property by disseysine or by intrusion, and so justly or unjustly, from the fact alone that he is in possession he has more right in the thing possessed than the person who is out of possession, and has

& nihil juris habet in re, ꝑpter cōmodum possidēdi, sive servus sit sive liber. Et cum verus dñs respondere possit cōtra servum suum existentē sub potestate sua, quòd juste eum ejecerit, vel quòd ei injuriam non fecit, quia rem illā emit de denariis & rebus dñi, hoc dicere non poterit extraneus ille, cujus servus non fuerit, quòd hoc fecerit de rebus suis, & ideo non habebit locum exceptio servitutis in persona extranei, sicut in persona domini. Item poterit quis juste possidere ab initio, & postea desinere possidere juste ex conventione, ut si feoffatus fuerit sub tali conventione, quod faciat vel non faciat, & si fecerit, convenit contra quod bene liceat ingredi possessionem, & sic pendet possessio donec conditioni satisfactum fuerit vel non. Item juste possidet, qui prætore autore possidet, i. ꝑ judicium donec de judicio constiterit, utrum justum vel injustum fuerit judicium, & hoc poterit curia[1] vocare ad warantum. Quicunq; igitur in possessione fuerit juste vel injuste, ut prædictum est, & fuerit disseysitus & assisam portaverit, non est necesse ab eo quærere, quo titulo vel quo jure fuerit in possessione, quia cogi possessorem &c. Et cum juste sive injuste possederit, quantum ad quosdam & quantum ad alios non, quia sufficit ut prædictum est, quoad restitutionem q̄ in seysina fuerit juste vel injuste, dum tamen nomine ꝑprio, nisi disseysitor ostendat contra ipsum, quòd nullam fecerit ei injuriā, vel injuste ipsum nō disseysiverit. Ex responso vero & exceptione tenētis, perpendi poterit utrū de ritulo[2] possessionis inquirēdū sit vel nō, sed si priùs queratur, non nocet in casu.

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[1] "curiam," MS. Rawl. C. 160. | [2] "titulo," *id.*

no right in the thing, on account of the advantage of possessing, whether he be a serf or a free person. And when the true lord can make answer against his serf being under his power, that he has justly ejected him, or that he has not done him injury, because he bought the thing with the money and things of his lord, the stranger whose serf he is not cannot say this, that he has done this with his things, and therefore the exception of serfdom will not have place in the person of a stranger, as in the person of the lord. Likewise a person may possess justly from the beginning and afterwards cease to possess justly under an agreement, as if he has been enfeoffed under such an agreement, that he will do or not do (a certain thing), and if he shall do it, it is agreed that it shall be allowable to enter into possession against him, and so the possession is suspended until the condition is satisfied or not. Likewise he justly possesses, who possesses under the authority of the prætor, that is, by a judgment, until it is settled concerning the judgment whether the judgment has been just or unjust, and he may invoke the court as a warranty. Whosoever, therefore, may be in possession, whether justly or unjustly, as has been said above, and has been disseysed, and has brought an assise, it is not necessary to inquire from him by what title or by what right he is in possession, for that the possessor should be compelled, &c. And when he has possessed, justly or unjustly, as far as regards some, and not so far as regards others, because it is sufficient, as has been said above as far as regards restitution, that he has been in seysine justly or unjustly, provided it has been in his own name, unless the disseysor can show against him that he has done him no injury, or that he has not disseysed him unjustly. But from the answer and exception of the tenant, it may be weighed whether an inquiry will have to be made into the title or not, but if it be previously questioned, it is not hurtful in the case.

2. Exceptio de hoc quod dicitur in brevi, injuste disseysivit. Britton, ii. ch. xix. § 1. Fleta, 241.

Cum igitur dicat querens quod injuste disseysitus fuit, oportet quod tenēs ostēdat q̄ juste, & tali jure, quia incōtinēti forte rejecit post aliā disseysinā. Ad quod replicari poterit q̄ injuste, eo quod p̄ lōgū intervallū, & ubi sibi p̄quirere debuit p̄ assisā, se fecit justiciarium. Itē si dicat quod juste, quia querēs nullū jus habuit nec liberū tenemētū nec feodū, quia p̄ disseysinā vel intrusionē, nec hoc valebit, quia si disseysitus nullum jus habuit tenendi, ille qui ejecit nullum jus habuit ejiciendi, quia injuste fuit in possessione disseysitus quātū ad ipsū, qui nihil juris habuit. Itē si dicat quod juste, quia talis ser^{o} est & nō potest assisam portare, hoc nō sufficit: cū nō sit serv^{o} ejus, quia nihil ad eū, nec dicere poterit q̄ juste eum ejecerit, quia est serv^{o} alien^{o}, & sic nō defendīt, quia nihil ad ipsum. Et maxime cum serv^{o} extra potestatem dñi existens & in statu libero assisā portare possit erga dñum suum proprium, cujus revera serv^{o} fuerit: multo fortius p̄sonā habebit standi in judicio versus eum, qui nihil juris habet in eo, & sic injuste erit disseysitus. Et tamen verus dñus respondere possit contra servum existentem sub potestate sua, q̄ juste eum ejecerit, vel q̄ injuriā ei non fecerit: quia rem illā emit de denariis & de rebus dñi. Hoc dicere non poterit extraneus ille, cujus servus non fuerit, quod hoc fecerit de rebus suis: & ideo non habet locum exceptio servitutis in persona extranei, sicut in persona domini. Item sine judicio, quia si disseysitor judicium expectaret, & per actionem

f. 196 b.

When the claimant therefore says that he has been unjustly disseysed, it is incumbent that the tenant should show that he has been justly disseysed, and by such a right, because he has perhaps forthwith ejected him after another disseysine. To which a replication may be made that he has unjustly disseysed him, on the grounds that he has disseysed him after a long interval, and where he ought to have had recourse to an assise, he has constituted himself a justiciary. Likewise if he should say that he has justly disseysed him, because the claimant had no right, neither a free tenement, nor a fee, because he was [in seysine] by disseysine or intrusion, this will not avail, because if the party disseysed had no right of holding, he who has ejected him had no right of ejecting him, because he was unjustly disseysed when in possession as regards him, who had no right. Likewise if he should say that he has justly disseysed him, because he is a serf and cannot bring an assise, this is not sufficient since he is not his serf, since he has no relations with him, nor can he say that he has justly ejected him, because he is another man's serf, and so he is not precluded from suing him, because he has no relations with him. And chiefly, since a serf being beyond the power of a lord and in a free state can bring an assise against his own lord, whose serf he is in reality, much more shall he have a right of suing in court against him who has no right over him, and so he will have been unjustly disseysed. Nevertheless the true lord may answer against the serf who is under his power, that he has justly ejected him, or that he has done no injury to him, for that he bought that property with the money and the things of his lord. A stranger, whose serf he is not, cannot say this, that he has done this with his things, and therefore the exception of serfdom has no place in the person of a stranger, as it has in the person of the lord. Likewise without a judgment, because if the disseysor waited for a judgment, and wished to claim by an

2. An exception to this that it is said in the writ, that he has unjustly disseysed.

f. 196 b.

petere vellet, nullam invenire posset in mūdo quæ ei posset competere, & ideò cùm nullam habere posset actionem, nulla ei competere debet exceptio contra servum, qui alienus est: quia sequeretur istud inconveniens, quod retinere posset per exceptionem & per malitiam, quod nunquam acquirere posset per actionem.

3. De exceptione villenagii, cum servus fuerit disseysitus.

Et unde ad exceptionē villenagii sic est distinguendum, cùm servus dicat se esse disseysitum. Inprimis videndum est utrum fuerit sub potestate domini sui, cùm fuerit disseysitus, vel extra potestatem domini, sicut in statu libero, quod in servitutem revocari non possit sine brevi nec sine judicio. Item cùm fuerit sub potestate dọmini, refert utrum feoffatus fuerit ab ipso suo domino, vel ab alio extraneo non domino. Et si â domino, utrum villenagium tenuerit cum tenemento libero vel non. Item refert quis ipsum disseysiverit, ipse dominus vel alius non dominus. Item cûm fuerit sub potestate domini, utrum rem tenuerit nomine proprio vel alieno, s. tenementum suum proprium, cûm fuerit ab aliquo feoffatus, vel alienū, cùm disseysinam fecerit vel intrusionem, & sic quodāmodo nomine ꝑprio vel alieno, ut si ad terminum annorum vel ad voluntatem dominorū quorum res fuerit, vel in villenagio. Item sive fuerit sub potestate sive extra, utrum feoffatus fuerit de re propria ipsius donatoris, vel de re aliena, cujus donator dominium non habuerit. Cûm autem fuerit sub potestate domini & feoffatus ab ipso domino suo, liberū habere poterit tenementum de voluntate domini, & à quocunq; fuerit disseysitus, sive à domino sive ab alio, seysinā suam recuperabit ꝑ assisam versus dm̃ suum, multo fortiùs versus alie-

action, he would not be able to find any to which he was entitled, and accordingly, since he could have no action, he ought not to be entitled to any exception against a serf, who is another's; because this inconvenience would follow, that he could retain by an exception and by a quirk, what he could never acquire by an action.

3. Of an exception of villenage, when a serf has been disseysed.

And hence as regards an exception of villenage, this distinction is to be made, when a serf says that he has been disseysed. In the first place it must be ascertained whether he was under the power of his lord, when he was disseysed, or beyond the power of his lord, as in a free *status*, that he could not be reclaimed into serfdom without a writ nor without a judgment. Likewise when he shall have been under the power of his lord, it is of importance whether he has been enfeoffed by his own lord or by a stranger not his lord, and if by his lord, whether he held a villenage together with a free tenement or not. Likewise it is of importance who disseysed him, the lord himself, or another not the lord. Likewise when he shall have been under the power of his lord, whether he held the thing in his own name or in another's name, to wit, his own proper tenement, when he has been enfeoffed by some one, or another's tenement, when he has made a disseysine or an intrusion, and so in some manner in his own name or in another's name, as if for a term of years or at the will of the lords, whose thing it was, or in villenage. Likewise whether he was under the power of a lord or beyond it, whether he was enfeoffed by the donor of his own property or of another's property, of which the donor had not the dominion. But when he has been under the power of a lord and has been enfeoffed by the lord himself, he will be able to hold a freehold with the will of the lord; and by whomsoever he shall be disseysed, whether by the lord or by another person, he shall recover his seysine by an assise against his lord, much more so against the lord of another person and a

num & extraneum, cujus servus nunquam fuit, quia si servus assisam portaverit super dominum suum, & dñs de servitute excipiat contra servum, servus replicare poterit contra dñm de facto & feoffamento ipsius domini, qui contra factum suum venire non poterit, ex quo semel hoc voluit, licet servus villenagium tenuerit cum ipso libero tenemento. Si autem de tenemento à domino dato fuerit per non dominum disseysitus, & ipse assisam versus non dominum arramaverit, & non dominus versus eum exciperet de servitute, nō valebit ei exceptio, quia nō excusatur (si dicat quod nullā injuriā ei fecit) quia est servus alienus, ex quo nihil ad ipsum, utrum liber sit an servus, quia non plus tenetur servus ei quâm ille servo, & ideo liber quantum ad extraneum ratione supradicta. Est enim servus proprius & alienus, ut meus, tuus, suus, & poterit quis esse liber homo unius & servus alterius. Item cûm servus sub potestate constitutus â non domino fuerit feoffatus, bene licebit domino terrā sic datā servo suo in manum suā capere, & servum disseysire, & si servus contra eum assisam portaverit, & dominus contra eum exceperit de servitute, bene licebit, & locum habebit talis exceptio, cùm fuerit â domino proposita, quæ locum non haberet, si proposita esset â non domino. Dicere enim poterit dominus quod tenementum, quod servus suus acquisivit, suum esse debet, quasi de denariis ipsius domini emptum, quod quidem extraneus dicere non posset. Si autem de permissione domini tenementum acquisitum tenuerit servus, si à quocunq; nō dño disseysitus fuerit, recuperabit per assisam. Et
f. 197. si feoffator suus eum ejecerit, & ipse assisam portave-

stranger, whose serf he never was; because if a serf shall have bought an assise against his lord, and the lord shall raise an exception of serfdom against his serf, the serf may reply against the lord upon the act and feoffment of the lord himself, who cannot go against his own act, since he has once willed it so, although the serf has held a villenage with the free tenement. But if he has been disseysed by a person not his lord from the tenement given to him by his lord, and he has brought an assise against the person not his lord, and the person not his lord has excepted against him on account of serfdom, the exception shall not avail him, because he is not excused (if he should say that he has done no injury to him) on the ground that he is another man's serf, because it is nothing to him, whether he be free or serf, because the serf is no more bound to him, than he is to the serf, and accordingly he is free as regards a stranger for the reason above said. For a serf may be one's own or another's, as mine, thine, his, &c.; and a person may be the free man of one person and the serf of another. Likewise when a serf established under the power [of a lord] has been enfeoffed by a person who is not his lord, it will be well allowable to his lord to take into his own hand the land so given to his serf, and to disseyse his serf; and if the serf should bring an assise against him, and the lord should except against him on the ground of serfdom, it will be well allowable; and such an exception will have place, when it is propounded by the lord, which would not have place, if it were propounded by one who is not the lord. For the lord may say that the tenement, which his serf has acquired, ought to be his, as if bought with the money of his lord, which a stranger could not say. But if the serf holds a tenement acquired with the permission of his lord, if he has been disseysed by one who is not his lord, he shall recover by an assise. And if his feoffer has ejected him, and he has himself brought an assise, and the feoffor has f. 197.

rit, & feoffator de servitute exceperit, servus replicabit de facto & feoffamento feoffatoris. Et illud idem dici poterit de domino proprio feoffante. Et cum non teneat in hoc casu exceptio servitutis â domino proposita ꝑpter factum suum, multò fortius valere non debet, cum proposita fuerit â non domino. Si autem â non domino, nec â feoffatore, sed ab extraneo omnino ejectus fuerit, & ejectus assisam portaverit, & excipiatur de servitute, talis exceptio non competit extraneo supradicta ratione. Et ideo ille qui queritur non habet necesse replicare de libertate, licet disseysitor se velit ponere de hoc in assisam, quia nihil pertinet ad extraneum de statu suo: quia licet se poneret in assisam de statu suo & convictus esset, tamen non sequeretur ex hoc q̄ injustè non disseysivisset eum, cûm talis sit servus alienus, & cum dominus servi habere non posset assisam, quia teneñtum non cepit in manum suam tempore quo fuit in manu servi sui ante disseysinā, nec servus ille, qui servus alterius sit, sic posset disseysitor ꝑ disseysinā sibi acquirere teñtum alienum, q̄ ꝑ actionem non posset, cum nihil juris ei competat omnino, & sic de malitia sua lucrum reportaret, q̄ esse non debet: & sic non habet servus alienus necesse ponendi se in assisam de statu suo, nisi velit. Sed si fecerit, & jurata dicat ipsum servum esse, sed alienum, videtur q̄ hoc ad extraneum non ꝑtinet ipsum disseysire, quia ipsum ejicit nullo jure sibi cōpetēte, sed alii. Et ideo ipse injustè, quia nullo jure, quod si dñs ꝑprius hoc faceret, compete-

excepted on the ground of serfdom, the serf shall reply upon the act and feoffment of the feoffor. And the same thing shall be said of his own lord as feoffor. And since the exception of serfdom, if advanced by the lord, does not hold good on account of his own act, much more ought it not to avail when it is advanced by one who is not his lord. But if he has been ejected by a person who is not his lord, nor his feoffor, but altogether a stranger, and having been ejected has brought an assise, and is excepted against on account of serfdom, such an exception is not allowable in a stranger for the reason aforesaid. And therefore he who complains is not under the necessity of replying on the question of his freedom, although the disseysor may wish to place himself on this question upon an assise, because a stranger is not concerned with his state; because although he should put himself upon an assise concerning his state and should be convicted, nevertheless it would not follow therefrom that he had not unjustly disseysed him, since he is another person's serf, and since the lord of the serf cannot have an assise, because he has not taken the tenement into his hand at the time at which it was in the hand of his serf before the disseysine, nor could that serf, who is the serf of another, be able as a disseysor to acquire for himself by a disseysine the tenement of another, which he could not [acquire] by an action, since he is entitled to no right whatsoever, and so he would of his fraud make gain, which ought not to be the case, and so another man's serf is under no necessity to submit himself to an assise respecting his state, unless he wishes it. But if he should do so, and the jury say that he is a serf, but the serf of another person, it seems that it is not competent for a stranger to disseyse him, because he ejects him with no right belonging to himself, but to another. And therefore he himself acts unjustly, because he acts with no right; but if his own lord should do this, he would be entitled to the exception of

ret ei exceptio villenagii. Sed cûm ita ꝑposita fuerit exceptio ab extraneo non domino, quod servus non habet assisam nec actionem : oportet q̃ plus dicat, quod hoc ideò, quia tenet in villenagio, & sic domino competit & non servo, & unde si tenementum fuerit liberum tenementum villani, oportet discutere utrum dominus illud in manu ceperit vel non ante assisam. Si autem in seysina fuerit servus nomine alieno (ut supradictum est) nulla competit ei assisa, sed competit ei cujus nomine fuerit in seysina, & sic in omni casu obstabit ei exceptio villenagii, quia nulla ei competit actio, sed domino rei. Item locum habet exceptio villenagii in omni casu, cùm fuerit sub potestate domini, cûm productus fuerit ad assisas & juratas faciendas, ubi excipitur persona villani, cùm dicatur, p̃ sacramentum liberorum & legalium hominum, &c. Sed de statu liberi aliud erit. Si autem servus sub potestate domini vel extra â quocunquè feoffatus fuerit de re aliena, quia justè possidet quantum ad feoffatorem suum, & quantum ad alios qui jus non habent, si a feoffatore disseysitus fuerit quandocunque recenter vel post tempus, recuperabit p̃ assisam & similiter versus omnes, quorum res nō fuerit. Si autem a vero domino ejectus fuerit incontinenti, versus illum non recuperabit, quia injustè possidet quantum ad ipsum, licet justè quantum ad alios homines. Si autem post longum intervallum, aliud erit, ut supra. Cûm autem in seysina fuerit nomine proprio, sicut per disseysinam vel per intrusionem, licet de injuria propria, tamen quia justè possidet quantum ad omnes qui jus non habent, si fuerit disseysitus, seysinam recuperabit per assisam, sicut

villenage. But when the exception has been so propounded by a stranger, not his lord, that a serf has no assise nor any right of action, it is incumbent that he say further, that this is on that account, because he holds in villenage, and so the lord is entitled and not the serf, and hence if the tenement be the freehold of the villein, it is necessary to discuss whether the lord has taken it into his hand or not before the assise. But if the serf has been in seysine in another person's name (as above said), he is not entitled to an assise, but the person is so entitled in whose name he was in seysine, and so in every case the exception of villenage will be an obstacle to him, because he is not entitled to an action, but the lord of the thing is so. Likewise the exception of villenage has a place in every case, when he is under the power of a lord, when he is produced to make the assises and the juries, when an exception is taken to the person of the villein, when it is said by the oath of free and loyal men, &c. But it will be different concerning the state of a free man. But if a serf being within the power of a lord or beyond it has been enfeoffed by any one with another person's thing, because he possesses it justly as regards the feoffor, and as far as regards others who have no right, if he has been disseysed by the feoffor at any time whatsoever, recently or after some time, he shall recover by an assise, and in like manner against all persons, whose thing it is not. But if he has been ejected by the true lord forthwith, he shall not recover against him, because he possesses unjustly as regards him, although justly as regards other men. But if after a long interval, it will be different, as above said. But when he has been in seysine in another person's name, as by disseysine or by intrusion, although unjustly as regards himself, nevertheless because he possesses justly as regards all who have no right, if he shall have been disseysed, he shall recover seysine by an assise, like any one else of the people, on account of

quilibet alius de populo, propter commodum possidendi
f. 197 b. ut suprâ, & versus illos qui jus habent fiat, ut supra paulo ante. Et quod feoffari poterit servus sub potestate domini constitutus, & habere liberum tenementum de permissione domini videtur, quod probari possit p hoc quod dicitur. Dicitur enim vulgariter quod quis potest esse servus unius & liber homo alterius, videlicet cum sit servus alicujus, & tenuerit de eo in villenagio, de permissione domini potest tenere liberè de alio, & sic esse liber homo alterius; sed nemo pro parte servus & pro parte liber, sed omnino servus & omnino liber, quod esse poterit diversis respectibus; & ex hoc sequitur (ut videtur) quod si liber esse possit quantum ad feoffatorem suum non dominum, merito liber esse possit quantum ad non dominum non feoffatorem, ad quem nihil pertinet de libertate vel servitute sua, licet talis sit servus domini sui, quantum ad personam suam, & tenementum quod est villenagium. Si autem liber homo villenagiū tenuerit, talis liber erit quantum ad omnes ad liberum tenementum recuperandum, si quod habeat: si à villenagio ejectus fuerit, non recuperabit, quia ejectus tenuit nomine alieno.

Britton, ii. ch. xviii. § 3. Supr. Lib. i. ch. 10. § 3. Cum autem servus sub potestate domini aliquando constitutus fuerit, p incuriam vel negligentiā domini effici poterit fugitivus, & dum fuerit in recenti fuga & recenter insecutus reduci poterit sine alicujus injuria, sicut dicitur in titulo de servis fugitivis: sed si per negligentiam dominorum in fuga perstiterit per tantum tempus quod sine brevi reduci non potest, nec teneatur sine brevi de statu suo respondere, extunc incipit esse in statu libero. Est enim statu liber, qui personam habet standi in judicio quasi liber, licet non sit. Et dicitur status à sto, stas, & est statu liber, cûm sine

the advantage of possessing as above, and against those who have right let it be done as said shortly above. f. 197 b.
And it appears that a serf who is established under the power of a lord may be enfeoffed, and have a free tenement with the permission of his lord, which may be proved through this saying. For the vulgar saying is that a man may be the serf of one person and the free man of another, to wit, when he is the serf of any one and holds of him in villenage, he may with the permission of his lord hold freely of another, and so be the free man of another, but no man can be partly a serf and partly a free man, but he is altogether a serf and altogether a free man, which he can be in different respects; and from this it follows, as it seems, that if he can be free as regards his feoffor who is not his lord, he may be deservedly free as regards one who is not his feoffor nor his lord, who is not concerned with his freedom or his serfdom, although he may be the serf of his lord, as regards his person and the tenement which is a villenage. But if a free man holds a villenage, such a person will be free against all persons, to recover any free tenement, if he has any; if he be ejected from the villenage, he shall not recover, because the ejected person held it in another name. But when a serf has been sometime established under the power of a lord, he may be rendered a fugitive through the carelessness or negligence of the lord, and whilst he shall be in recent flight and is recently pursued, he may be brought back without injury to any one, as is said in the title on fugitive slaves. But if through the negligence of his lord he has persisted in his flight for so long a time, that he cannot be brought back without a writ, nor is he bound without a writ to answer as to his *status*, from that time he begins to be free. For he is by *status* free who has a right of *standing* before a court as if he were free, although he be not so. And *status* is said from I stand, thou standest, and he is by *status* free, when he

brevi de statu suo respondere non teneatur; & sicut servus poterit esse statu liber, eadem ratione (vice versa) poterit liber esse statu servus, ut supra, de statu hominum de hac materia. Cûm autem quis ita extra potestatem & in statu libero constitutus, tenementum liberum acquisierit, & inde sine judicio disseysitus fuerit, non multum refert quis eum disseysiverit, utrum dominus suus proprius feoffator de proprio feoffamento vel de feoffamento alieno, vel non dominus feoffator, vel omnino extraneus, ad quem nihil pertinet, quia versus omnes indifferenter recuperabit, quia injustè disseysitus est, & habet personam standi in judicio versùs omnes, donec status suus mutatus fuerit, quod dominus suus eum recuperaverit per judicium per breve de nativis, & semper habebit exceptionem de statu suo, donec corpus suum disrationatum fuerit cum sequela & catallis suis quę corpus sequuntur, quod est principale. Et cùm personam habuerit standi in judicio, sicut statu liber, erga dominum ppriū recuperabit, cujus revera servus est, non obstante exceptione servitutis, donec corpus recuperaverit. Multo fortiùs stabit in judicio versus alium extraneum, cujus servus non fuerit, non obstante illa exceptione, sive extraneus feoffator fuerit, sive non. Et cùm nihil jus habeant in persona, multo fortiùs nec in sequela, nec in rebus suis. Cum igitur in statu libero & extra potestatem perquisitum fecerit â quocunque domino vel non domino, & dominus ipsum disseysiverit, & cùm talis statu liber assisam portaverit in absentia domini, vel ita quod nihil sit acceptū[1] contra assisam de statu, sive dominus sit presens sive absens, & juratores dicant ipsum omnino esse liberum, nulla facta

Britton, ii. ch vii. § 5. Fleta, 194.

f. 198.

[1] "exceptum," MS. Rawl. C. 160.

is not bound to answer respecting his *status* without a writ, and as a serf may be by *status* free, by the same reason conversely a free man may be by *status* a serf, as above, concerning the *status* of men on this subject. But when a person thus established beyond the power [of a lord] and in a free *status*, has acquired a free tenement, and has been disseysed therefrom without a judgment, it does not much matter who has disseysed him, whether his own lord and his feoffor from his own feoffment or from another's feoffment, or his feoffor who is not his lord, or altogether a stranger, to whom nothing pertains, because he will recover against all indifferently, because he has been unjustly disseysed, and has a right of standing in court against all persons, until his *status* has been changed by his lord having recovered him by a judgment under a writ of naifty, and he will always have an exception concerning his *status*, until his body has been recovered with his suite and his chattels, which follow his body, which is the principal thing. And when he has a right of standing in court, as by *status* free, he shall recover against his own lord, whose serf he is in reality, notwithstanding the exception of serfdom, until he has recovered his body. Much more shall he have a stand-place in court against another stranger, whose serf he has not been, notwithstanding that exception, whether his feoffor be a stranger or not. And since they have no right over his person, much more will they have no right over his suite or his things. When therefore being in a free *status* and beyond the power of his lord he has purchased something from any person, the lord or not the lord of it, and the lord has disseysed him, and when such a person by *status* free has brought an assise in the absence of his lord, or so that no exception has been raised against the assise on the ground of *status*, whether his lord be present or absent, and the jurors say that he is altogether free, no mention having been made that he is by *status* free or f. 198.

mentione quod statu liber sit vel omnino servus, cum sit extra potestatem, convincendi sunt, nisi in ipsa convictione respondeatur contra assisam, ac si dominus præsens esset: & multo fortius si servus fuerit sub potestate domini, facta diligenti examinatione. Si autem cum præsens fuerit, & in statu libero, & cum petierit per assisam, objiciatur ei villenagium â domino disseysitore, & ille dicat præcisè se esse liberum, nulla facta replicatione de statu libero, & inde se statim ponat in assisam vel juratam patriæ, vertitur assisa in juratam ad inquirendum de statu, utrum videlicet liber sit vel servus, nec erit locus convictioni in hoc casu, quia de consensu querentis deducitur status in judicium, & secundùm hoc stabit vel cadet assisa, nec præjudicabitur ei quantū ad statum, nec quantum ad alias actiones, quin replicare possit de statu libero, quia si juratores dicant ipsum esse servum, nihil mutabitur de statu suo, sed hoc solum sequitur, quod nihil capiet per assisam nec liberabitur domino, sicut esse deberet, si sub potestate domini esset, cum assisam portaret. Et quia si postmodum agatur de statu, defendere se possit p exceptiones suas ppetuas & peremptorias, quod sit in dominico domini regis, vel in civitate aliqua per annum & diem, vel clericus & hujusmodi, cum agatur de statu mutando. Item si excipiat de tempore. Sed quid si hujusmodi exceptiones opponat contra exceptionem servitutis propositam in modū exceptionis contra disseysinam? videtur quod per hoc terminatur tam causa status quam assisa novæ disseysinæ, q non esset, si diceret, sum in statu libero non terminatur, quia quoad hoc non agitur de con-

Britton, i. ch. xxxii. § 8.

Britton, ii. ch. vii. § 3. Fleta, 194.

altogether a serf, since he is beyond the power [of his lord], they are to be convicted unless in the very conviction it be answered against the assise, as if the lord were present, and much more so, if the serf was under the power of his lord, upon a diligent examination having been made. But if when he has been present, and in a free state, and when he has claimed by an assise, villenage has been objected against him by his lord the disseysor, and he says precisely that he is a free person, no replication having been made of his being free by *status*, and he therefore puts himself forthwith upon an assise or jury of the country, the assise is turned into a jury to inquire into his *status*, whether, to wit, he is free or a serf, nor will there be any place for a conviction in this case, because by the consent of the claimant his *status* is brought before the court, and according to this the assise will hold good or fail, nor will prejudice be worked against him as regards his *status* nor as regards other actions, so as to prevent him replying on the ground of his free *status*, but this only follows, that he shall take nothing by the assise nor shall he be delivered up to his lord, which he ought to be, if he were under the power of his lord when he brought the assise. And because, if an action concerning *status* be brought, he may defend himself by his perpetual and peremptory exceptions, that he is in the demesne of the lord the king, or has been in some city for a year and a day, or is a clerk, and such like, when a question of change of *status* is raised. Likewise if he raises an exception on account of time. But what if he raises exceptions of this kind against an exception of serfdom propounded in the manner of an exception against a disseysine? It seems that by this as well the cause of *status* as the assise of novel disseysine is terminated, which would not be the case, if he should say, "I am in a free *status*;" it is not terminated, because in respect of this the action is not taken with the con-

sensu partium, vel si juratores dicant ipsum esse servum, nihil capiet per assisam sed domino remanebit seysina. Si autem dicant quod liber sit, recuperabit per assisam, sed sive sic sive non sic, nihil ex hoc præjudicabitur domino vel servo in causa status, si dominus postea eum petierit per breve de nativis, quia status opponitur in modum exceptionis, & terminatur per consensum, sed propter hoc non cadit questio status. Si autem querens sub potestate domini esset in hoc casu, & juratores dicerent querentem esse servum, per hoc caderet assisa, & sic remaneret ei tenementum simul cum servo, salva tamen eidem servo (sicut in præmisso casu) questione super statu suo, si proclamare velit in libertatem: quia non magis nocebit exceptio status opposita in modum exceptionis ei [1] qui fuerit in possessione servitutis, quin proclamare possit in libertatem & probare, quam noceret domino proposita in superiori casu de statu libero, si postmodum in servitutem peteretur servus. Si autem sic dicat querens ab initio, cum fuerit in statu libero & per dominum disseysitus, & cùm proposita fuerit exceptio servitutis, quod sit in statu libero, quicquid dominus dicat, & petat judicium si debeat statum suum in assisam ponere vel in probationem aliquam, donec fuerit restitutus, cùm si dominus jus haberet in corpore, quod principale est, prius corpus recuperare deberet, & postea id quod corpus sequitur, & non debet sine judicio sequelam vel catalla quæ sequuntur corpus sibi usurpare, sed primò debet assisa procedere de disseysina: & cùm statu liber per assisam recuperaverit, tunc postea agat dominus suus per

Britton, ii. ch. vii. § 6. Fleta, 194.

f. 198 b.

[1] "ei," omitted MS. Rawl. C. 160.

sent of parties, or if the jurors should say that he was a serf, he will take nothing by the assise, and the seysine will remain to the lord. But if they say that he is free, he will recover by the assise, but whether so or not so, no prejudice will be thereby done to the lord or the serf in a cause of *status*, if the lord shall afterwards claim him under a writ of naifty, because "*status*" is opposed by way of an exception, and is determined by consent, but on that ground the question of *status* does not fall. But if the claimant were under the power of his lord in this case, and the jurors should say that the claimant was a serf, the assise would thereby fail, and so the tenement together with the serf would remain with him, saving, however, to the same serf (as in the case premised) a question respecting his *status*, if he wishes to challenge his liberty; because the exception of *status* opposed in the way of an exception to him, who was in possession of serfdom, will not harm him, so as to prevent him challenging his freedom and proving it, any more than, if it were propounded in the case above mentioned concerning his free *status*, it would harm the lord, if the serf should afterwards be claimed into servitude. But if the claimant say so from the commencement, when he has been disseysed in a free *status* and by his lord, and when the exception of serfdom has been propounded, that he is in a free *status*, whatever his lord may say, and should claim a judgment whether to submit his *status* to an assise or to any proof until he has been restored [to his lord], since if the lord has any right to his person, which is the principal object, he ought to recover his person first of all, and then that which follows his person, and he ought not to usurp to himself without a judgment his suite and the chattels which follow his person, but he should proceed by the assise on the disseysine first of all, and when he has recovered by the assise as free by *status*, then let his f. 198 b.
lord afterwards proceed by a writ of naifty concerning

breve de nativis de statu suo, non obstante replicatione de statu libero. Et cùm corpus recuperaverit, tunc recuperabit quicquid corpus sequitur, scilicet sequelam, terras, & catalla, quod quidem si primò ante restitutionem ageret de statu, petendo illum in servitutē, nunquam ei respōderet in causa status, obstante exceptione spoliationis. Et cū post assisam de statu agatur, tunc primo ꝑponere poterit in modum exceptionis privilegia sua, per quæ se tueri poterit imperpetuùm in statu libero, quod prius (nisi velit) necesse non habebit: ut si clericus fuerit ordinatus, vel miles, vel extiterit in villa privilegiata, vel in dominico domini regis ꝑ unū annum & unum diem sine clameo. In primo enim casu defendat eum in assisa liber status tātum. In secundo verò casu defendunt privilegia statum suum, cùm petatur in servitutem ꝑ breve de nativis. Cùm vero servus extra potestatem & in libero statu seysinam suam recuperaverit ꝑ assisam versus dominum suum, cujus revera servus fuerit, non obstante exceptione servitutis, venit quidam extraneus a latere ad quem nihil pertinet & disseysiat eum, licet sua non intersit, servus profert assisam novę disseysinæ, disseysitor opponit ei exceptionem servitutis, & cum ad exceptionem probandam nullā aliam habeat ꝓbationem ꝑ parentes, vel alio modo quod querens servus sit, ponit se in assisam disseysitor, & cum requiratur â querente eodem modo si velit ponere se in assisam, querens eligere poterit utrum se ponere velit in assisam de statu suo, vel replicare ut suprâ, quod non habet necesse ponere statum suum in assisam vel juratam per parentes, antequam fuerit restitutus. Et idem erit judicium quod suprâ contra dñm suum, quia si locum habeat replicatio contra dominum, multo fortiùs locum habere debebit contra extraneum. Et

Britton, i. ch. xxxii. § 8. Glanville, l. v. c. 5.

his *status*, notwithstanding his replication concerning his free *status*. And when he has recovered his body, then he shall recover whatever follows his body, to wit, his suite and chattels, whereas if he should first of all before restitution proceed concerning his *status*, by claiming him into serfdom, he would never answer him in a cause of *status*, the exception of spoliation being in the way. And when after the assise a question of his *status* is raised, then for the first time he can propound in the way of an exception his privileges, whereby he can always maintain himself in a free *status*, which he had no necessity to do unless he chose: as if he were an ordained clerk, or a knight, or has lived in a privileged township or in the demesne of the lord the king for a year and a day without being claimed. For in the first case his free *status* alone defends him in the assise, but in the second case his privileges defend his free *status*, when he is claimed into serfdom by a writ of naifty. But when a serf beyond the power [of his lord] and in a free *status* has recovered his seysine by an assise against his lord, whose serf he is in reality, notwithstanding the exception of serfdom, some stranger to whom nothing pertains steps from the side and disseyses him, although he has no interest, the serf brings forward an assise of novel disseysine, the disseysor objects to him an exception of serfdom, and when to prove his exception he has no other proof through his parents or in any other way that the claimant is his serf, the disseysor puts himself on an assise; and when it is required of the claimant in the same way if he wishes to put himself on an assise, the claimant may choose whether he wishes to put himself on an assise concerning his *status*, or to reply as above, that it is not necessary for him to put his *status* upon an assise or a jury by his parents, before he has been restored [to his lord]. And the judgment will be the same as above against his lord, for if a replication holds good against his lord, much more ought it to have place against a stranger. And let it be that gratuitously and

esto ꝙ gratis & sine aliqua replicatione se posuerit in assisam de statu suo, & assisa dicat quod servus sit, non videtur quod extraneus aliquid sibi per hoc acquirere possit, cum non sit servus suus sed alterius, & quicquid servus juste acquirit, acquirit domino suo, quasi emptum de re sua & non extraneo. Nec cûm quis servus sit, nò erit servus cuilibet de populo, quia sunt jura separata in servo, quia aut est meus omnino aut tuus proprius vel communis. Item si rem peteret disseysitor extraneus, nulla competeret ei actio, si autem corpus servi, non possit eum probare esse suum nec de denariis suis emptum, quod quidem dominus servi dicere poterit & nullus alius, & quicquid servus juste acquirit, hoc acquirit domino & non alii. Et ideo cum in nulla parte habeat actionem, defendere non possit disseysinā & injuriā suam ꝑ exceptionem, & sic erit casus diversus inter servum & dñm suum, & servum & extraneum. Nec cùm servus statu liber dicat ꝙ extraneus eum injuste disseysiverit, nulla ratione se defendere possit disseysitor quin injuriam fecerit, & ideo injuste, quia nullo jure & sine assisa aliqua, quia si dicat (ut prędictum est) ꝙ eum disseysiverit juste quia servus alienus est, hoc non ꝑtinet ad ipsum, sed ad eū cujus servus fuerit. Si autem dicat ꝙ ejecit eum juste, quia nullū jus habuit in re sed alius, nunquā ostendet ꝑ hoc quod ipsum juste ejecerit, cûm ille qui in possessione fuerit majus jus habeat in re possessa, eo ꝙ in possessione
f. 199. fuerit, quam ille qui fuit extra, qui nullum jus habuit. Igitur ad nullum extraneum non dominum ꝑtinet opponere exceptionem villenagii cōtra assisam de re quam servus tenuerit nomine ꝑprio, licet ad ipsum pertineat, cùm servus sit in possessione nomine alieno:

without any replication he has put himself on an assise concerning his *status*, and the assise says he is a serf, it does not seem that a stranger can gain anything thereby for himself, since he is not his serf but another person's serf, and whatever a serf justly acquires he acquires for his lord, as if bought with his things, and not for a stranger. Nor, when a person is a serf, is he anybody's serf, because there are separate rights in a serf, for he is either mine altogether, or thine, or common to us. Likewise if the disseysor as a stranger claims the thing, he will not be entitled to an action, but if he claims the person of the serf, he cannot prove him to be his serf nor bought with his money, which the lord of the serf and no one else may say, and whatever the serf justly acquires, he acquires for his lord, and for nobody else. And accordingly since he has in no part a right of action, he cannot defend his disseysine and his injury except by an exception, and thus the case between a serf and his lord and between a serf and a stranger will be different. Nor when a serf who is free by *status* says that a stranger has unjustly disseysed him, the disseysor cannot in any way defend himself from having done an injury and on this ground unjustly, because [he acts] with no right and without any assise, for if he should say (as aforesaid) that he has disseysed him justly, because he is the serf of another person, this does not appertain to him, but to that person whose serf he may be. But if he should say that he has justly ejected him, because he had no right in the thing, but somebody else had, he will never show by this means that he has justly ejected him, since he who was in possession had more right in the thing possessed, from the fact that he was in possession, than he who was out of possession, who had no right. Therefore no f. 199.
stranger, who is not his lord, is entitled to oppose an exception of villenage against an assise concerning a thing which a serf has held in his own name, although he is entitled when the serf is in possession in another

sed hoc ideò, quia servo non competit actio sed dño, cujus nomine fuerit in possessione. Nec erit assisa differenda propter exceptionem servitutis, cùm servus replicaverit de statu libero, quia priûs determinanda est disseysina & spoliatio, quàm status questio. Et notandum, quòd non habet statu liber necesse ponendi statum suum in assisam, nec compelli debet ad hoc p denegationem actionis in assisa, antequam status suus, de spoliatione sibi facta, fuerit ei restitutus: quia cùm spoliatus esset & disseysitus, si sibi p assisam non perquireret, & p breve de nativis in servitute[1] peteretur, non ꝑcederet actio de statu suo, opposita exceptione spoliationis, antequam restitueretur, vel juratā,[2] nisi p stultitiam suam hoc gratis[3] voluerit se ponere in juratam, quòd sit liber vel servus; & si fecerit, tamen non præjudicatur statim[4] nisi tantum ad hoc, quòd assisa non procedat, licet producti fuerint parentes ad probandam exceptionē, sed aliâ actione opus erit ad statū suum mutandū. Si autem judicium petat, si se ponere debet in assisam de aliquo, quod tangat statum suum, anteq̃ fuerit restitutus, licet in modum exceptionis opposita fuerit questio status, pro eo judicare debet & primo ꝑcedat assisa utrum disseysitus fuerit vel non. Si autem opposita fuerit exceptio status ei, qui fuerit in potestate domini, sive reverà servus fuerit sive liber. Si vero apponatur[5] & per parentes ꝑbetur ad servum, liberabitur domino ut servus, & ponet se in assisam de statu suo velit nolit, alioquin denegabitur ei actio in

[1] "servitutem," MSS. Rawl. C. 160 and 159.

[2] "vel juratam" down to "aliud "erit," omitted in MS. Rawl. C. 159.

[3] "gratis fecerit quod sit," MS. Rawl. C. 160.

[4] "statui," MS. Rawl. C. 160.

[5] "si servo opponatur," MS Rawl. C. 160.

person's name, but this is for the reason that a serf is not entitled to bring an action, but his lord is, in whose name he is in possession. Nor will the assise have to be put off on account of the exception of serfdom, when the serf shall have replied that he has a free *status*, because the disseysine and the spoliation have to be determined before the question of *status*. And it is to be noted, that a person of a free *status* is not under the necessity of putting his status on an assise, nor ought he to be compelled to this by the denial of an action on an assise, before his *status*, concerning the spoliation caused to him, has been restored to him: because when he has been spoiled and disseysed, if he does not claim for himself by an assise, and he should be claimed into serfdom by a writ of naifty, the action concerning his *status* would not proceed, the exception of spoliation having been raised, before it should be restored; nor on a jury, unless through his own stolidity he should gratuitously wish to put himself on a jury, that he is a free man or a serf; and if he shall have done so, nevertheless he is not prejudiced forthwith excepting only so far, that the assise cannot proceed, although his parents have been produced to prove the exception, but there will be need of another action to change his status. But if he seeks a judgment [on the question] if he ought to put himself upon an assise on any matter which touches his *status*, before he shall have been restored, although the question of *status* has been objected by way of exception, it ought to be adjudged in his favour, and the assise should in the first place proceed whether he has been disseysed or not. But if the exception of *status* be objected against him who is in the power of a lord, whether he be in reality his serf or a free man. But if he be opposed and it be proved by his parents that he is a serf, he shall be delivered up to the lord as his serf, and he shall put himself upon an assise concerning his *status*, whether he will or not, otherwise an action on his complaint shall

querela. Si autem statu servus fuerit, cùm revera sit liber homo, & bona fide possessus, aliud erit.

4. Qui exceptionem villenagii opposuerit, statim habeat probationem.

Si quis autem hujusmodi exceptionem villenagii opposuerit, statim ad manum habeat probationem, vel post tempus, secundûm quod justiciarii de gratia concesserint faciendum. Et quòd excipiens probationem habere debeat per parentes, si excipere voluerit contra eos qui sunt sub potestate: habetis in itinere abatis de Redinge & M. de Patesh. in comitatu Warr̃, assisa nove disseysine, si W. de Ardern, & secundum quod tenens exceptionem suam ꝑbaverit, remanebit assisa vel procedet, nisi forte tam tenens quam querens se gratis vel de necessitate sine ꝑductione parentum de hoc se posuerint in assisam in modū juratæ, & sic ꝑ juratā terminabit negotium sine aliqua parētum ꝑductione: ut de ultimo itinere ipsius M. in com̃ Essex, assisa mortis antecessoris, si Henricus le Turner. Et declarato ꝑ juratā utrum ita sit vel non, vel remanebit assisa, vel ꝑcedet. Sed notādum, q̃ quidā tenent liberè & ꝑ liberum servitium, & quidā nō liberè, licet ꝑ liberum servitiū. Itē esto q̃ villan[9] teneat ꝑ liberum servitium sibi tātum, nulla facta mentione de hæredib[9], si cùm eject[9] fuerit ꝑferat assisā, & cùm objecta fuerit exceptio villenagii, replicet q̃ liberè teneat & petat assisā, nō valebit replicatio, ex quo nulla mentio facta est de hæredibus, q̃a liberum tenementum in hoc casu non mutat statum, si fuerit sub potestate dñi cōstitut[9]. Ut in eodē itinere in com̃ Essex, assisa nove disseysine, si Radulphus de Goggēhal. Itē esto q̃ nullū sit
f. 199 b. objectum villenagium in principio, sed juratores dicant

be denied to him. But if he be a serf by *status*, when he is in reality a free man, and is possessed in good faith, it will be another thing.

4. He, who raises an exception of villenage, should at once proceed to prove it.

But if any one has objected an exception of villenage in this manner, let him at once have at hand his proof, or after a time, according as the justiciaries may of grace decide. And that the party raising the exception ought to have his proof by the parents, if he wishes to except against those who are under the power of some one, you have in the iter of the abbot of Reading and Martin de Pateshull, in the county of Warwick, an assise of novel disseysine, if W. de Ardern; and according as the tenant has proved his exception, the assise will be stayed or will proceed, unless by chance as well the tenant as the claimant have gratuitously or of necessity without the production of the parents put themselves on this subject on an assise in the manner of a jury, and so the business be terminated by a jury without the production of the parents, as in the last iter of Martin, in the county of Essex, an assise of the death of an ancestor, if Henricus le Turner. And upon a declaration by the jury whether it be so or not, either the assise will be stayed or will proceed. But it is to be noted that some persons hold freely and by a free service, and some not freely although by a free service. Likewise let it be that a villein holds by a free service to himself alone, no mention having been made of heirs, if when he has been ejected, he shall bring forward an assise, and when an exception of villenage has been raised, he shall reply that he holds freely and requests an assise, the replication will not avail, since no mention has been made of heirs, because a free tenement in this case does not change his *status*, if he is established under the possession of a lord. As in the same iter in the county of Essex, an assise of novel disseysine, if Radulphus de Coggeshall. Likewise let it be that no objection of villenage has been raised at the beginning, but the jurors say in their verdict that f. 199 b.

in veredicto q̃ querens liber sit & libere tenuerit, cùm sit servus, vel liber & in villenagio tenuerit, vel servus, licet tenuerit tantùm sibi & non hæredibus p̃ liberum servitium, & postea cùm agatur de convictione, inveniatur contrarium, juratores quasi convicti remanebunt, ut in eodem itinere, assisa novæ disseysinæ de Gregorio de Shelford & Johanne Jocelin. Item esto q̃ cùm ab initio opposita fuerit exceptio villenagii, & ex parte tenentis, s. domini, sub cujus potestate villanus fuerit, & ad exceptionem probandam in modum juratæ p̃ducti fuerint villani de parentela querentis, & qui se cognoscant ad villanos, & contra quos ex parte querentis non excipitur, & ex parte ipsius querentis & replicantis nullus liber p̃ducatur ad p̃bandā replicationem, quamvis se ponere voluerit in assisam, cadit â querela; & tenens quietus: ut de ultimo itinere M. de Pateshull in com̃ Eborum circa finē rotuli.

5. Si fiat exceptio villenagii libero homini, qui tenet in villenagio per villanas consuetudines.

Itē esto q̃ opponatur libero exceptio villenagii, quia tenet p̃ servitia villana, nō nocebit ei exceptio quātū ad statum, nocebit tamē quātum ad teñtū recuperandum, nō quātū ad statū, q̃a poterit relinquere villenagiū, & ut liber homo recedere, ut de termino sancti M. anno regni regis H. 3. incipiente 4, in com̃ Sussex de Johañe de Monte Acuto & Martino de Bestenovere, ubi dictum fuit prædicto Martino, q̃ si vellet terram illam tenere, faceret cōsuetudines quas pater suus fecit. Si autē non, dñs suus caperet villenagium in manum suam, & unde videt̃ p̃ hoc, q̃ licet liber homo teneat villenagiū p̃ villanas consuetudines cōtra voluntatē suā

the claimant is a free man and has held freely, when he is a serf, or is a free man and has held in villenage, or a serf although he has held only for himself and not for his heirs by a free service, and afterwards when proceedings are taken for a conviction, the contrary is found, the jurors shall remain as it were convicted, as in the same iter, an assise of novel disseysine concerning Gregory de Shelford and John Jocelin. Likewise let it be that when an exception of villenage has been objected from the beginning, and on the part of the tenant, to wit, of the lord, under whose power the villein shall be, and to prove the exception in the manner of a jury, villeins have been produced who are amongst the relations of the claimant, and who acknowledge themselves to be villeins, and against whom it is not excepted on the part of the claimant, and on the part of the claimant himself who is replying no free man is produced to prove his replication, although he wishes to put himself on an assise, he is cast in his plaint, and the tenant is quiet, as in the last iter of Martin de Pateshull at the end of the roll.

5. If an exception is raised against a free man, who holds in villenage by villein customs.

Likewise let it be that an exception of villenage is raised against a free man, who holds by villein services, the exception will not harm him as far as regards his *status*, it will harm him however as regards his recovery of his tenement, not as regards his *status*, because he can give up his villenage and withdraw from it as a free man, as in the term of Saint Michael in the third and fourth years of the reign of king Henry III. in the county of Essex, concerning John de Monte Acuto and Martin de Bestenovere, where it was said by the aforesaid Martin, that if he wished to hold that land, he must perform the customary services, which his father had performed; but if not, his lord should take the villenage into his hand, and hence it seems through this, that although a free man holds a villenage by villein customs he ought not to be ejected against his

ejici nō debet, dum tamen facere voluerit cōsuetudines, quæ ptinent ad villenagium, & quæ præstātur ratione villenagii, & non ratione ꝑsonæ. Si autem tales consuetudines faceret ratione ꝑsonæ, sicut villanus constitutus sub potestate, vel ratione utriusq; tam teñti q̄ ꝑsonæ, tūc noceret exceptio. Et q̄ talis exceptio servitutis objecta contra ꝑsonam liberam in modum exceptionis ratione consuetudinum villanarum non nocet alicui homini libero in causa status, si petatur in villenagium, vel in aliquo placito sive super possessione, sive super ꝓprietate: ꝓbatur manifestè in rotulo de termino H. & P. sub uno volumine, anñ regni regis H. 4, in coñ Sussex, de M. de Best., qui tulit breve de libertate ꝓbanda versus Johannē de Mōte Acuto, qui ipsum clamavit ut nativū & fugitivum suū. Et unde cùm idē Martin° corā justiciariis diceret se esse liberū, respōsum fuit ex parte Johānis q̄ villanus fuit, q̃a disrationavit eum corā justiciariis in villanum suum. Et unde postea justiciarii recordati fuerint ꝓ rotulos suos, in quos idē Johañes se posuit, q̄ quædā jurata capta fuit inter eos de servitiis & consuetudinib°, quas idē Johañes exigebat ab eodem Martino, & ꝓ quā convictū fuit q̄ facere debuit de teñto q̄ de prædicto Johañe tenuit, omnimodas villanas consuetudines, & unde dicebat, q̄ villanus suus fuit. Ad q̄ respondit Martinus, q̄ liber fuit, & quòd tales fecit consuetudines villanas, sed hoc non fuit ratione ꝑsonæ suæ liberæ, sed ratione teñti quod tenuit in villenagio de eodem Johanne, & ita non nocuit ei illa exceptio in causa status. De hac autem materia inveniri poterit in itinere W. de Ralegh in coñ Leyc., assisa mortis

will, as long as he is willing to fulfil the customs which pertain to the villenage, and which are performed in respect of the villenage, and not in respect of his person. But if he should perform such customs in respect of his person, as a villein established under the power [of the lord], or in respect of both, as well of the tenement as of his person, then the exception will do harm: and that such an exception of serfdom objected against a free person in the manner of an exception by reason of villein customs does not harm any free man in a cause of *status*, if he is claimed into villenage, or in any plea either about possession or about property, is proved manifestly in the roll of Hilary and Easter term in one volume, in the fourth year of the reign of king Henry III., in the county of Sussex, concerning Martin de Bestenovere, who brought a writ for proving his freedom against John de Monteacuto, who claimed him as his naif and his runaway. And hence when the said Martin before the justiciaries said that he was a free man, it was answered on the part of John that he was a villein, because he had recovered him before the justiciaries as his villein. And hence afterwards the justiciaries remembered through their own rolls, upon which the said John had put himself, that a certain jury had been held between them concerning certain services and customs, which the said John required from the said Martin, and by which jury he was convicted that he ought to perform for the tenement, which he held from the aforesaid John, all kinds of villein customs, and hence he said, that he was his villein. To which Martin replied, that he was a free man, and that he performed the said villein customs, but this was not in respect of his free person, but in respect of the tenement which he held in villenage of the said John, and so that exception did not harm him in a cause of *status*. But concerning this matter there will be found in an iter of William de Ralegh, in the county of Leicester, an assise of the death

antecessoris, si Robertus Freman, &c., ubi dicitur, q̃
q̃mvis libero homini objiciatur villenagium petēti sey-
f. 200. sinā antecessoris, eo q̃ villanas fecerit consuetudines
ratione alicujus villenagii, non propter hoc convincitur
ad villanum, nec obstabit exceptio quin p̃cedet assisa,
& oportebit tenentem (si de statu agere voluerit) alias
habere probationes. Ad hoc etiam facit quod habetis
in rotulo de termino Hillarii, añ regis H. 4, in com̃
Sussex, de eodem Martino, qui warantisavit quandam
terram cuidam tenenti suo, in quadam assisa mortis
antecessoris. Et unde objectum fuit eidem M. quòd
warantisare non potuit quia villanus fuit ratione su-
pradicta, quia talliari potuit ad plus vel ad minus, &
quod dare deberet merchetum pro filia sua maritanda,
& ideo judicium ut supra. Et quod inquiri debeat
utrum hujusmodi consuetudines fieri debeant ratione
personæ, vel ratione tenementi, vel ratione utriusq̃:
inveniri poterit in assisis captis coram ipso rege
p̃ Wilhelmum de Ralegh apud Cauteshull in com̃
Norff: anno regis H. vicesimo tertio, assisa novæ dis-
seysinæ, si Robertus de Rikinghale. Et in eodem,
assisa novæ disseysinæ, si Wilhelmus Byrd., & in eodem,
assisa novæ disseysinæ, si R. de Merlay. Refert etiam
in prædictis casibus ubi liber homo villanas fecerit
consuetudines & servitia, utrum servitia sint certa &
determinata vel incerta, ad hoc quod competat ei
assisa vel non. Item cùm liber homo teneat in soka-
gio, in dominicis domini regis, refert utrum teneat ut
sokmannus in sokagio libero vel villano, ad hoc q̃
habeat assisam vel non habeat, vel ut feoffatus tenendi
liberē p̃ certa servitia & determinata. Quo casu, si

of an ancestor, if Robert Freman, &c., where it is said that although villenage be objected to a free man claiming seysine of an ancestor, on the ground that he has performed villein customs in respect of a villenage, he is not on that account convicted as a villein, nor will the exception be an obstacle to prevent the assise proceeding, and it will be incumbent on the tenant (if he wishes to raise the question of *status*) to have other proofs. This has also support in the case which you have in the roll of Hilary term, in the fourth year of the reign of king Henry, in the county of Sussex, concerning the same Martin, who warranted some land to a certain tenant of his, in an assise of the death of an ancestor. And hence it was objected to the said Martin that he could not warrant, because he was a villein on the ground above mentioned, inasmuch as he could be talliaged more or less, and that he ought to pay blood-money for leave to marry his daughter, and therefore judgment passed as above. And that an inquest should be made whether customs of this kind ought to be performed in respect of the person or in respect of the tenement or in respect of both, may be found in assises held before the king himself by William de Ralegh at Cauteshull, in the county of Norfolk, in the twenty-third year of king Henry, an assise of novel disseysine, if Robert de Rikinghale. And in the same an assise of novel disseysine, if William Byrd, and in the same an assise of novel disseysine, if R. de Merlay. But it matters in the aforesaid cases, where a free man has performed villein customs and services, whether the services were certain and determinate or uncertain, for this object, that he should be entitled to an assise or not. Likewise when a free man holds in sockage in the demesnes of the lord the king, it matters whether he holds as a sockman in free or villein sockage, for this object that he should have an assise or not, or as a feoffee to hold freely by certain and determinate services. In f. 200.

feoffatus fuerit (ut prædictum est) tenendi liberè vel in libero sokagio, ut si p̄ servitium militare vel p̄ certa & determinata servitia, dum tamen liber homo sit & non villanus, & fuerit ejectus, recuperabit p̄ assisam, eo non obstante q̄ faciat talia servitia, quia tenet liberè. Si autem in sokagio villano sicut de dominico dñi regis, licet servitia certa sunt, obstabit ei exceptio villenagii, quia talis sokmannus liberum teñtum non habet, quia tenet nomine alieno. Et q̄ talis liber homo p̄ conventionem taliter feoffatus assisam habere poterit (si fuerit ejectus) non obstante exceptione villenagii, videri poterit in rotulo de termino Paschæ anno regni regis H. duodecimo in coñ Warr̃ de Wilhelmo de Bissopest, dum tamen servitia certa sint. Si autē incerta fuerint, qualecunq̄ fuerit tenemētum, tunc erit villenagium, ubi nec assisa novæ disseysinæ, nec mortis antecessoris nec alia nō magis quā in villano sokagio, nisi tātùm jurata inter tales cōsimiles, secundum cōsuetudinē manerii. Et de hac materia inveniri poterit de itinere W. de Ral. in coñ Midd. de termino S. Trin. sub uno volumine añ regni regis H. 13, ubi distinguunt plura genera hominum tenentium diversis modis. Itē si objiciatur villenagiū tali adjectione, q̄ quis assisam portare nō potest, q̃a villanus est, & pater suus vel avus vel ali⁹ antecessorum p̄ quorum seysinā petierit p̄ assisam mortis antecessoris, si nulla sit hinc inde p̄batio, poterit p̄ juratam veritas declarari, si uterq̄ sponte se posuerit in juratā. Ut de itinere W. Ral. in coñ Buck., assisa mortis antecessoris, si Walter⁹ le Gard., & simi-

which case, if he has been enfeoffed (as aforesaid) to hold freely and in free sockage, as if by military service or by certain and determinate services, provided he be a free man and not a villein and he has been ejected, he shall recover by an assise, notwithstanding that he performs such services, because he holds freely. But if [he holds] in villein sockage, as of the demesne of the lord the king, although the services are certain, the exception of villenage will stand in his way, because such a sockman has not a freehold, for he holds in the name of another. And that such a man enfeoffed in such manner by a convention may have an assise (if he has been ejected) notwithstanding the exception of villenage, may be seen in the roll of Easter term, in the twelfth year of the reign of king Henry, in the county of Warwick, concerning William de Bissopest, provided the services are certain. But if they are uncertain, whatever may have been the tenement, it will then be a villenage, where neither an assise of novel disseysine nor of the death of an ancestor nor any other any more than in villein sockage, except only a jury amongst those of like condition according to the custom of the manor. On this matter something may be found in the iter of William de Ralegh, in the county of Middlesex, in Trinity term, under one volume, in the thirteenth year of the reign of king Henry, where several kinds of persons are distinguished holding in different manners. Likewise if the objection of villenage is raised with this addition, that a person cannot bring an assise, because he is a villein, and his father or grandfather or another of his ancestors through whose seysine he claims under a writ of the death of an ancestor, if there be no proof on one side or on the other, the truth may be declared by a jury, if both will put themselves of their own accord on a jury. As in the iter of William de Ralegh, in the county of Buckingham, an assise of the death of an ancestor, if Walter le Gardener, and in like manner in the

liter de itinere ejusdē in cōm̃ Midd., anno regni regis H. 13, assisa mortis antecessoris, si Godefridus. Et si inquiri debeat per parentes de statu parentum mortuorum, videtur quod non possit, quia de statu alicujus
f. 200 b. post mortem nō quærit̃. Inquiri tamen non debet utrum bastardus sit qui mortuus est, vel villanus. Inquiri autem poterit utrum talis fuit ut supra vel non. Item si simpliciter opponatur quod querens villanus est, & querens hoc neget, vel se non cognoscat ad villanum, tunc procedat assisa, ac si nihil dictum esset quare assisa remanere non deberet, ut de itinere episc. Dunelm̃ & M. de Pateshul in cōm̃ Eborum, añō regni regis H. 3, assisa novę disseysinę, si Jacobus filius Siwardi. Item esto q̃ excipiat̃ de villenagio & querens negaverit, & replicetur, q̃ querens semel se cognovit ad villanum in curia regia, vel alia quæ habet recordum, tunc p̃ talem cognitionem obstabit ei cognoscenti in omni judicio vel jurata exceptio imperpetuum. Et cum hoc fuerit p̃positum: si cōtingat q̃ juratores hoc p̃bato in alio judicio vel assisa tali dederint liberum tenementum sicut libero, convincendi erunt de perjurio: ut de termino Sanctæ T. añ regis H. 4, in cōm̃ Dors., de Hamel. filio Radulphi. Sed esto q̃ quis se ponat in juratam super ista exceptione, & juratores dicant se nescire utrum villanus sit vel non, in hoc dubio debet p̃ libertate judicari, quia si nesciunt utrum talis sit vel non, tunc nesciunt eum esse talem sed

iter of the same [justiciary], in the county of Middlesex, in the thirteenth year of the reign of king Henry, an assise of the death of an ancestor, if Godfrey. And if an inquest is to be made through the relatives concerning the *status* of dead relatives, it seems that it cannot be done, for no inquiry can be made concerning f. 200 b.
the *status* of any person after his death. No inquiry, however, ought to be made whether he who is dead is a bastard, or a villein. But an inquiry may be made whether such a person was as above or not. Likewise if it be simply objected that the claimant is a villein, and the claimant denies this, or does not acknowledge himself to be a villein, then let the assise proceed, as if nothing had been said why the assise should not be stayed, as in the iter of the bishop of Durham and Martin de Pateshull, in the county of York, in the third year of the reign of king Henry, an assise of novel disseysine, if James the son of Siward. Likewise let it be that he excepts on the ground of villenage, and the claimant denies it, and it be replied that the claimant has once acknowledged himself to be a villein in the king's court or in a court which has a record, then through such an acknowledgment the exception will for ever be an obstacle to the person, who has so acknowledged himself, in every judgment and in every jury. And when this has been set forth, if it happens that the jurors after this has been proved have in another judgment or assise given to such a person a free tenement, as to a free person, they will have to be convicted of perjury, as in the term of Holy Trinity, in the fourth year of king Henry, in the county of Dorset, concerning Hamel. the son of Ralph. But let it be that a person puts himself on a jury upon such an exception, and the jurors say that they know not whether he is a villein or not, in this state of doubt judgment ought to be given in favour of freedom, because if it be unknown whether he is such or not, then they are ignorant that he is such or a

villanū,[1] & quoties dubitatur an quid sit, perinde est ac si nō esset illud. Et generaliter in omni casu, ubi quis dicat q villanus sit querens, & ipse neget vel dicat contrarium, & gratis se inde posuerit in juratam, cum tali tamen protestatione, quod si dicant juratores q servus sit, remaneat assisa sine aliqua recuperatione habenda p convictionem, vel alio modo: & vice versa si dicant ipsum esse liberum, q pcedet assisa, nec erit in hac parte locus joco partito,[2] nec etiam convictioni, propter mutuam utriusque voluntatem. Et vice versa, si non fuerit opposita exceptio villenagii, sed querentes & tenentes si se simpliciter ponant in assisam, & absq; eo q aliquid dicatur contra assisam, si juratores dicant p una parte sive p alia, locus erit convictioni, quia assisa capta est in modum assisæ & non juratæ, & hoc sive querens liber sit sive servus, sub potestate domini vel extra constitutus. Ad hoc facit (ut videtur) de itinere Roberti de Veer & M. de Pateshull in coñ Oxoñ & Hereford, anno regni regis H. 5. Item si quis quocunq; modo vel manumissus, vel privilegiatus, vel alius in servitutem petitus qui ppetuā habuerit exceptionem in tali statu obierit, & filius vel alius hæres postmodum seysinā talis antecessoris post mortem ipsius nactus fuerit, & sine judicio ejectus, p assisam novæ disseysinæ recuperabit, ppter liberum statum antecessoris sui. Et vice versa, si liber homo in statu servili obierit, ut si ingrediatur ad ancillā in villenagium, vel libera se

[1] "sed villanum." "Scilicet villanum" is the reading of MS. Rawl. C. 160.

[2] "joco partito," MS. Rawl. C. 159. MS. Middle Temple and MS. Bodley 170 read "loco partito." "Joco partito" is used by Bracton below, ch. 32, § 2, and is the correct phrase, being the Latinised equivalent of "jeu partie" used by Britton. See Ducange, Glossarium.

villein, and as often as it is doubted whether a thing be so or not, it is the same as if it did not exist. And generally in every case, where any one says that the claimant is a villein, and he himself denies it or asserts the contrary, and he gratuitously puts himself on a jury, with such a protest however, that if the jurors should say that he was a serf, the assise shall be stayed without having any recovery by a conviction, or in any other way; and conversely, if they say that he is free, then the assise shall proceed, nor shall there be in this part place for jeopardy,[1] nor even for a conviction, on account of the mutual assent of both. And conversely, if an exception of villenage has not been objected, but if the claimants and the tenants have simply put themselves on an assise, and without the fact of anything having been said against the assise, if the jurors say for one party or for the other, there will be place for a conviction, because the assise has been held in the manner of an assise, not of a jury, and this whether the claimant is free or a serf, established under the power of a lord, or beyond it. This has support (as it seems) in the iter of Robert de Veer and Martin de Pateshull, in the counties of Oxford and Hereford, in the fifth year of the reign of king Henry. Likewise if any one in any way either manumitted or privileged, or another one claimed into serfdom who had a perpetual exception has died in that *status*, and his son or other heir has afterwards obtained the seysine of such an ancestor after his death, and has been ejected without a judgment, he shall recover by an assise of novel disseysine, on account of the free *status* of his ancestor. And conversely, if a free man has died in a servile *status*, as if has cohabited with a female serf in a villenage, or a free woman has coupled herself to a

[1] "jeopardy." The original phrase is "jeu partie," which is used by Britton, l. ii. ch. xvii. § 8. "Et si de ceo soit debat entre les parties, "de office soit enquise la verité, "mes ne mie en jeu partie de per- "dre ou de gayner, tut le voillent "les parties."

copulet villano, vel si liber homo, bona fide possessus ab aliquo, sive in libertatem ꝑclamaverit in vita sive nō, & ita in statu servili obierit, filius vel alius hæres, si post eum seysinā habuerit & injuste & sine judicio ejectus de aliquo tenemento q̄ pater vel alius antecessor tenuit, dum tamen sub potestate alicujus constitutus sicut servus, licet re vera liber sit, hęres ejus ꝑ assisā nove disseysinę nō recuperabit, maxime ꝑpter statum servilem in quo antecessor obiit. Et ad hoc facit de itinere W. de Ralegh in coñ Buck., assisa novæ disseysinæ, si Lucia. Et inter cætera notādum, q̄ licet
f. 201. villanus in civitate vel in loco privilegiato manserit, vel extra potestatem dñi fuerit, seysinā aliquam antecessoris petere non poterit, licet possit ꝑpriā in causa spoliationis, alienam autem petere non poterit, si antecessor de cujus seysina petierit villanus fuit, quia villanus erga dñm suum sub cujus fuerit potestate actionem non habebit, in eo quòd villanus existens in statu servili, quia hæredem non habebit nisi dominum suum, de tenemento autem de quo feoffatus fuerit, sive extra potestatem dñi sive sub potestate, dum tamen dominus tenementum tale in manum suam non ceperit: si ejectus fuerit ab aliquo quocunq̄ quàm â dño, seysinam suam per assisam recuperabit. Cùm autem villenagium opponatur in modum exceptionis, licèt probata fuerit exceptio, non tamen præjudicatur ei ꝑpter hoc in causa status, si postea in servitutem petatur, & ideo probari debet exceptio villenagii ꝑ assisam, & non ꝑ parentes, si ille contra quem excipitur fuerit extra potestatem ejus, qui exceptionem opponit, quia si ꝑ parentes, ita posset præjudicari ei con-

villein, or if a free man, possessed by some one in good faith, whether he has asserted his claim to freedom in his lifetime or not, and so has died in a servile *status*, his son or other heir if he has had seysine after him and has been ejected unjustly and without a judgment from some tenement, which his father or other ancestor has held, whilst he was established as a serf under the power of some one, although he was in reality a free man, his heir shall not recover by an assise of novel disseysine, chiefly on account of the servile state in which his ancestor died. This is supported by the iter of William de Ralegh, in the county of Buckingham, an assise of novel disseysine, if Lucia. And amongst other things it is to be noted, that although a villein has remained in a city or in a privileged place, or has been beyond f. 201. the power of his lord, he cannot claim any seysine of an ancestor, although he may in his own cause of spoliation, but he cannot claim another's seysine, if the ancestor concerning whose seysine he claims has been a villein, because a villein shall not have an action against his lord, if he is under his power, on the ground that he is a villein existing in a servile *status*, because he shall have no heir but his lord respecting the tenement of which he has been enfeoffed, whether beyond the power of his lord or within it, provided the lord has taken such tenement into his hand; if he shall be ejected by any one else than his lord, he shall recover by an assise. But when villenage has been objected in the way of an exception, although the exception may have been proved, it is not, however, prejudged against him on that ground in a cause of *status*, if he should be claimed into serfdom afterwards, and accordingly the exception of villenage ought to be proved by an assise, and not through the parents, if he against whom the exception is raised be beyond the power of him who raises the exception, because if it be proved through the parents, it might be prejudged against him, against whom the exception is

tra quem excipitur in causa status, ubi nulla alia ꝑbatio nisi ꝑ parentes, si sufficiens vel directa. Si autem ille, cui opponitur, sub potestate dñi extiterit, tunc benè poterit, nisi ita si forte, quòd talis injustè possessus, postea proclamare vellet in libertatem, quia si ei qui sub potestate dñi sui extiterit opponatur â dño suo villenagium, & ꝑducantur parentes ad ꝑbandam, ꝑbato villenagio ꝑ parentes terminabitur causa status cum assisa, q̃ quidem esse non poterit, si querens fuerit extra potestatem. Quia si parentes ꝑducantur ad exceptionem probandam villenagii contra assisam, nec ꝑ exceptionem præjudicari possit querenti quoad statum, si dominus postea velit talem in servitutem petere, & villenagium per parentes probare, sic esset probatio super probationem, & una illarum superflua. Item esto quòd villanus (ut prædictum est) sub potestate domini constitutus vel extra portet assisam, & contra ipsum excipiatur de villenagio, & ipse fortè se ponere voluerit in juratam super exceptione, nihil aliud erit (ut videtur) nisi quod ei denegetur assisa, sive actio, cum distinctione tamen. Et eodem modo si tenens qui exceptionem opposuerit illam nullo modo ꝑbare voluerit, vel non possit per parentes, nec per juratam dictum suum velit probare, quasi indefensus, & dictum suum & exceptionem non ꝑbans, possessionem restituet querenti, nisi aliud dixerit quare assisa debeat remanere. In fine notandum, q̃ quandoq̃ opponitur exceptio villenagii â parte parti, quãdoq̃ à juratore & non à parte post sacramentum factũ, ubi dicunt juratores, q̃ talis villanus est & non potest habere liberum tenementum: & unde si res aliter se habeat

raised in a cause of *status*, where no other proof but that through the parents is sufficient or direct. But if he, against whom it is objected, should be under the power of a lord, then it may well be, unless by chance it should be, that such a person being unjustly possessed, should wish afterwards to claim his freedom, because if against him who shall be under the power of his lord villenage be objected by his lord, and the parents be produced to prove, upon the villenage having been proved by the parents, the cause of *status* will be terminated with the assise, which could not be if the claimant were beyond his power. Because if the parents should be produced to prove the exception of villenage against the assise, and it could not be prejudged by an exception against the claimant as regards his *status*, if the lord shall afterwards wish to claim him into serfdom and to prove his villenage by his parents, there would thus be proof upon proof, and one of them would be superfluous. Likewise let it be that a villein (as aforesaid) established under the power of a lord or beyond it shall bring an assise, and an exception of villenage be raised against him, and he by chance wishes to put himself on a jury upon the exception, there will be nothing else (as it seems) than that an assise or an action should be denied to him, with a distinction however. And in the same way, if a tenant who has raised an exception does not choose to prove it in any way, or cannot prove it by the parents, nor is willing to prove his assertion by a jury, he shall restore to the claimant his possession, as if he had no defence, and neither proving his assertion nor his exception, unless he can allege other reasons why the assise ought to be stayed. In the end, it is to be noted, that sometimes an exception of villenage is objected by a party against a party, sometimes by a juror and not by a party after the oath has been taken, when the jurors say that such an one is a villein and cannot hold a free tenement, and hence if the thing be

in veritate, facta examinatione â judice, si juratores in dicto suo ꝑseverent, locus erit convictioni, si querens docere possit contrarium per juratam 24 vel ꝑ parentes, ꝙ superiùs dictum est in principio. Item si à parte parti opponatur ante sacramentum, aut opponitur ei qui est sub potestate dñi, & qui tãtum tenet in villenagio, vel q̃ tenet in villenagio & similiter liberum teñtū de feoffamẽto alicuj⁹ dñi sive extranei, & tunc aut opponiť à dño vel ab extrãeo. Et eodẽ modo si opponať ei qui est extra potestatẽ dñi in statu libero, in quib⁹ casibus omnibus si q̃rẽs simpliciter negaverit
f. 201 b. sine aliqua replicatiõe, & inde ponat se super juratam, & tenens similiter, utraq; pars facit juratam quasi judicem ꝑ consensu, & ꝑ juratam terminabitur negotium sine aliqua convictione: quia non erit locus convictioni ꝓpter consensum, & querens ꝑ hoc recuperabit vel amittet, & sive querens sit sub potestate domini sive extra, & sive in libertatem ꝓclamet in possessione servitutis constitutus, sive in servitutem petatur existens in statu libero extra potestatem dñi, non præjudicabitur ei quantum ad defensionem status sui, salvo tamen hoc, ꝙ si sub potestate fuerit & ꝑ parentes convincatur ad villanum dñi sui, qui ꝓbaverit illum villanum esse & suum, ꝙ dñs suus semper eum retinebit villanum sine alia probatione, quia in hoc casu terminabitur assisa simul cum ipso statu, ꝙ quidem nõ est in aliis casibus, ut si extraneus opponeret exceptionem vel dñs ei qui fuerit extra potestatem, quia alia ratione super statu agi oportet. Item opposita

otherwise in truth, upon an examination having been made by the judge, if the jurors persevere in their finding, there will be place for a conviction, if the claimant can prove the contrary by a jury of twenty-four or by the parents, as has been said above at the commencement. Likewise if it be objected by one party against the other party before the oath, it is either objected against him who is under the power of a lord and who holds only in villenage, or who holds in villenage and at the same time a free tenement of the feoffment of another lord or stranger, and then it is objected either by the lord or by a stranger. And in the same way if it be objected against him who is beyond the power of his lord in a free *status*, in all of which cases, if the claimant has simply denied without any replication and f. 201 b. thereupon puts himself upon a jury, and the tenant similarly, both parties make the jury the judge by consent, and the business will be terminated by the jury without any conviction, because there will be no occasion for a conviction on account of their consent, and the claimant will recover or will lose thereby, and whether the claimant is under the power of a lord or beyond it; and whether he claims his freedom being established in the possession of serfdom, or whether he be claimed into serfdom being in a free *status* beyond the power of his lord, it shall not be prejudged against him as far as regards the defence of his *status*, with this reservation however, that if he be under the power of his lord, and be convicted by his parents of being the serf of his lord, who has proved him to be a villein and his own villein, that his lord shall always retain him as his villein without any other proof, because in this case the assise will be determined together with his *status*, which is not the fact in other cases, as if a stranger should raise an objection, or a lord against him who is out of his power, because proceedings respecting *status* ought to be conducted in another manner. Likewise upon an exception

exceptione villenagii à domino ei, qui fuerit sub potestate sua, de tenemento quod tenet in villenagio tantùm, si servus dicat replicando se esse liberum, ꝑbet replicationem ꝑ parentes, vel alio modo ꝑ assisam si possit, alioquin nulla erit replicatio, sed tenebit exceptio, non tamen præjudicabitur querenti in causa status. Item si opponatur ei à domino, qui fuerit sub potestate dñi & tenuerit in villenagio, in hoc casu si constiterit quòd ita tenuerit etiam sive liber sit sive servus, non oportet excipere de servitute, quia cùm teneat in villenagio non competit alicui querela nec actio, nec contra dominum nec contra extraneum: contra extraneum non, quia servus non habet querelam sed dñs, & ideò non necesse est excipere de villenagio, cùm querens nō habeat actionem. Si autem tenuerit sub potestate constitutus liberè, similiter & in villenagio, si dñs eū ejiciat de libero tenemēto, cōpetit servo cōtra dñm actio & querela, sed contra actionem cōpetit dño exceptio servitutis, ad actionem & querelam elidendam. Si autem extraneus talem ejecerit à libero tenemento, competit servo directa actio, & extraneo tenenti nulla exceptio q̃a sua non interest ejicere, nec si esset extra possessionem & peteret, nulla competeret ei actio, & ideò nulla exceptio. Si autem servus fuerit extra potestatē & ejectus fuerit à libero tenemento suo de ꝑquisito, si ei petenti restitutionē ꝑ assisam objiciatur villenagium, & sine aliqua replicatione de statu simpliciter se ponat in assisam, secūdùm assisam sive juratā judicabit̃, nec erit locus cōvictioni,

of villenage having been raised by a lord against him who is under his power, concerning a tenement which he holds in villenage only, if the serf in replying should say that he is free, let him prove his replication by his parents or in some other manner by an assise, if he can, otherwise the replication will be null, but the exception will hold good, it will not however be prejudged against the claimant in a cause of *status*. Likewise if the exception be raised by a lord against him who shall have been under his power and held in villenage, in this case if it be established that he has so held, even whether he be free or a serf, it will not be incumbent upon him to raise an exception on the ground of serfdom, because as he holds in villenage he is not entitled to a plaint nor an action, neither against his lord nor against a stranger; not against a stranger, as a serf has no right of plaint, but his lord, and on that account it is not necessary to raise an exception of serfdom, since the claimant has no right of action. But if he has held freely whilst established under his power, in like manner and in villenage, if the lord should eject him from the freehold, the serf has a right of action and plaint against the lord, but against the action the lord is entitled to raise an exception of serfdom to parry his action and plaint. But if a stranger has ejected such a person from a freehold, the serf is entitled to a direct action, and the stranger as tenant has no right of exception, because it does not concern him to eject [the serf], and if he were out of possession and made a claim, he would not be entitled to any action, and on that account not to any exception. But if a serf has been out of the power of his lord and has been ejected from a free tenement of his own purchased by himself, if upon his claiming restitution by an assise villenage be objected to him, and without any replication concerning his *status* he simply places himself upon an assise, it shall be judged according to the assise or the jury, nor shall there be place for a conviction, nor

nec liberabit dño, quāvis tūtū amittat ꝑ assisam, nec ꝑ hoc terminabit questio status. Et si postmodū petat in servitutē, nō præjudicabit ei, quin defendere se possit in statu libero si in servitutē petatur. Eodem modo videt de extraneo, si servus querens nihil replicavit q ejus nō intersit. Si autē cōtra dñm replicaverit de statu libero, vel cōtra extraneū q sua nō intersit, hoc recognito ꝑ diligētē examinationē, nō erit procedēdū ad assisam quamdiu talis status duraverit, nisi gratis se posuerit in assisa, donec mutet. Eodē modo dici poterit de eo qui est sub potestate, q̃a oportet eū ꝑbare se liberū, velit nolit, antequam procedat assisa: & sic mutare statū, q̃a hujusmodi cognitio de statu in replicatione præjudicialis est & præābula, nec erit necessè eū qui fuerit extra potestatē docere de aliquo privilegio, nisi tātū q fuerit extra potestatē,
f. 202. & in tali statu libertatis, q sine brevi revocari nō possit in servitutē, & ubi si voluerit & necesse fuerit, se defendere possit in statu libero ꝑ privilegīm vel alio modo, quia privilegia locum habent in causa status, & petere poterit judicium si debeat de statu agere spoliatus antequam fuerit restitutus.

Cap. XXIV.

1. De exceptione rationе adjuncti, ut si libera

Item excipere poterit tenens contra querentem, & habet exceptionem ratiōe adjūcti, ut si mulier libera nupta sit villano in potestate dñi sui cōstituto, ut si ante copulam conjugalem accidit ei hæreditas vel post,

shall he be delivered up to the lord although he loses the whole by the assise, nor shall the question of *status* be thereby determined. And if afterwards he be claimed into serfdom, he shall not be thereby prejudiced in his defence of his free *status*, if he be claimed into serfdom. In the same manner it seems concerning a stranger, if a serf who is a claimant has not replied, that he has no interest in the question [of his serfdom]. But if he has replied against his lord concerning his free *status* or against a stranger that it does not concern him, upon this having been recognised by a diligent examination, it will not be proceeded with to an assise as long as such a state has lasted, unless he should gratuitously put himself on an assise, until it is changed. In the same way it may be said concerning him who is under the power [of a lord], that it is incumbent upon him to prove himself to be free, whether he will or not, before the assise proceeds, and so to change his *status*, because this cognisance concerning *status* is prejudicial in the replication and is preambular, nor will it be necessary for him who is beyond the power [of his lord] to explain about any privilege, excepting only that he is out of his power and f. 202. in such a state of liberty that he cannot be reclaimed without a writ into serfdom, and where if he wishes and it is necessary, he may defend himself in a free *status* through a privilege or in some other way, because privileges have place in a cause of *status*, and he may claim a judgment whether he ought to proceed upon his *status* whilst dispossessed, before he shall have been restored.

Chapter XXIV.

Likewise the tenant may except against a claimant, and he has an exception by reason of an adjunct, as if a woman has married a villein who is established under the power of a lord, as if before the conjugal copula an inheritance has fallen to her or afterwards, and the lord

1. Of an exception by reason of an adjunct, as if a free woman has

nupserit villano. Britton, ii. ch. xi. § 22. ch. xii. § 1.

& dñs illius servi illos ejecerit, & uterquè querantur, cùm neuter possit sine alio (secundùm quosdam, quod non approbo) obstabit exceptio mulieri ꝑpter virum suum villanum, qui ei adjungitur, & nunquàm in vita viri recuperabit, obstante illa exceptione, & non nisi post mortem (quasi tunc cessante impedimento) datur actio, ut cessante causa cesset effectus: sed nō ꝑ breve de nova disseysina formatum, sed ꝑ breve q̃ tale erit, Rex vic. salutem. Præcipe A. q̃ justè &c. reddat B., quæ fuit uxor C., unum mesuagiū cum ꝑtinentiis in E., q̃ clamat esse jus & hæreditatē, vel jus & maritagiū suum, vel jus suum de dono I., qui ipsam B. inde feoffavit; vel sic: quòd clamat esse dotem suam de dono C. primi viri sui, & in quod idem A. non habebit ingressum, nisi ꝑ prædictum C. quondam virum ipsius, qui ei illud dimisit, cui ipsi in vita sua contradicere non potuit, ut dicit. Et nisi &c. Teste &c. Post mortem dico, sive mortuus fuerit morte naturali vel civili. Civili, ut si in vita uxoris habitum receperit; ita quòd ad seculum redire non possit. Sed quæro qualiter de hoc constare possit. Respondeo, quòd non nisi ꝑ literas ordinarii, archiepiscopi viz. & episcopi, coram quibus facienda erit professio. Literæ vero abbatis vel prioris non sufficiunt ad probationem, licet sufficere possunt ad præsumptionem, habitus vero ꝓbationi non sufficit. Itē morte naturali dico, quia mors naturalis omnia solvit. Sed quid, si mulier disseysita libera sub nomine suo impetraverit, & postea nupserit villano, & ante captionem assisæ moriatur villanus, quæro an ꝓcedere debeat assisa, & tenebit

of that serf has ejected them, and both claim, since neither can [claim] without the other (according to some, which I do not approve), an exception on account of her villein husband, who is adjoined to her, will be an obstacle to the woman, and she will never recover during the lifetime of her husband, that exception being in the way, and an action is not allowed her until after his death (as if upon the impediment ceasing), so that the cause ceasing the effect will cease; but not by a formal writ of novel disseysine, but by a writ of this kind: The king to the viscount greeting. Enjoin A. &c., that he restore to B., who was the wife of C., a messuage with its appurtenances in E., which she claims to be her right and inheritance, or her right and maritage, or her right by donation of J. who enfeoffed B. with it; or thus: which she claims to be her dower by donation of C., her first husband, and into which the said A. shall not have entry, except through the aforesaid C. formerly her husband, who demised it to her, whom she in her lifetime could not gainsay. And unless, &c. Witness, &c. I say after the death [of her husband], whether he be dead by a civil or by a natural death. By a civil death, as if during the lifetime of his wife he has adopted the [ecclesiastical] habit, so that he cannot return to the world. But I ask, how is this to be ascertained? I answer, that it can only be ascertained by the letters of the ordinary, that is the archbishop or the bishop before whom his profession had to be made. But the letters of the abbot or the prior are not sufficient for proof, although they may be sufficient to found a presumption, but the ecclesiastical habit is not sufficient for proof. Likewise I say by a natural death, because a natural death resolves all things. But what if a free woman who has been disseysed shall have obtained a writ under her own name, and has afterwards married a villein, and the villein dies before the holding of the assise, I ask whether the assise ought to proceed, and will the writ previously obtained

married a villein.

breve prius impetratum, vel si antequam nupserit disseysita fuerit, & post mortem villani impetraverit, tenebit utrumq; breve & ꝑcedent assisæ, quia ꝓvenerunt in eum casum à quo incipere potuerūt. Sed in prædictis casibus semper videndum erit de statu villani, utrum fuerit sub potestate dñi constitutus, vel extra & in statu libero, secundum quod superi[2] satis dictū est. Itē excipi poterit cōtra mulierē q̄rentē ratione adjūcti, s. viri sui quāvis liberi: ut si simul disseysiti fuerint de jure uxoris, ābo simul recupabūt & neuter sine alio, non vir sine uxore, q̄a agit̄ de jure uxoris, nec uxor sine viro, q̄a vir est caput uxoris & eā defendere debet. Aliud autē dicēdū est de jure viri, q̄a hereditas viri nō tāgit uxor̄, sive uxor villāa fuerit & ī villēagio cōstituta, sive nō. Itē esto q̄ vir dederit aliq̄d de hereditate uxoris, & talē in seysinā posuerit, uxor ꝑ se assisā nō habebit sine viro, sīul autē nō, q̄a si simul agāt & petāt ꝑ assisā, obstabit factū & dōatio viri, & ita cadit assisa, nec recupabit uxor unquam in vita viri sui: competit ei tamen remedium post mortem viri sui ꝑ breve de ingressu, cui in vita sua contradicere non potuit &c. Eodem modo si uxor de re ꝓpria donationem fecerit in vita viri sui, ambo ꝑ assisam non poterunt simul petere, nec quilibet ꝑ se: alia igitur actione opus erit viro, etiam in vita uxoris. Item esto q̄ vir & uxor simul disseysiti, simul

f. 202 b.

hold good, or if she has been disseysed before she married, and after the death of the villein she has obtained a writ, will both writs hold good and will the assises proceed, because they have arrived at that case from which they could commence? But in the aforesaid cases it will always have to be seen concerning the *status* of the villein, whether he was established under the power of a lord, or was beyond it and in a free *status*, according to what has been said above. Likewise it may be excepted against a woman claimant by reason of an adjunct, to wit, her husband, although he be free, as if they have been disseysed simultaneously of the right of the wife, they shall both together recover, and neither without the other, not the husband without the wife, because the action is about a right of the wife's, nor the wife without the husband, because the husband is the head of the wife, and ought to defend her. It is, however, to be said otherwise concerning the right of the husband, because the inheritance of the husband does not touch the wife, whether the wife be a villein and established in villenage or not. Likewise let it be that the husband has given away something of his wife's inheritance, and has put such an one into seysine, the wife shall not have an assise by herself without her husband, but together with him not, because if she brought an action together with him and claimed by an assise, the act and donation of the husband would be an obstacle, and so the assise falls, nor shall the wife ever recover during the lifetime of her husband, but she is entitled to a remedy after the death of her husband by a writ of entry, which he could not during his lifetime gainsay, &c. In the same way, if a wife has made a donation of a thing of her own in the lifetime of her husband, both cannot together claim by an assise, nor either one or other of them alone: there will, therefore, be need of another action for the husband, even in the lifetime of the wife. Likewise let it be that the husband and wife having been disseysed together, have

f. 202 b.

impetraverint assisam, & uxor moriatur ante captionem assisæ, cadit omninò breve & assisa, sed si vir moriatur ante captionem assisæ, cadit breve sicut in primo casu, nec ipsa iterum agere potest p se, quia simul fuerunt disseysiti & simul debent restitui. Consulitur tamen uxori p breve de ingressu, s. in quam non habuit ingressum nisi p disseysinam, quam fecit ei & prædicto tali viro suo, & unde assisa novæ disseysinæ arramata fuit, & visus terræ &c. Et remansit assisa capienda p mortem prædicti talis viri sui, vel etiam sine clausula prædicta, licet nunquam in vita viri sui impetratum esset, quia negligentia viri sui non debet ei imputari, licet vir suus sibi tēpestivè pquisivisse potuisset. Item esto q mulier vidua dum fuit sui juris sine viro disseysita assisam pquisiverit, & ante captionem assisæ nupserit, cadit breve sed non assisa, formabitur enim aliud breve sub nomine suo & sub nomine viri sui, quod tale erit.

Britton, ii. ch. xviii. § 9.

2. Forma brevis, ubi vir nunquam fuit in seysina, sed uxor, cum ipsa petere non posset per se sine viro.

Questi sunt nobis talis vir & uxor ejus, q talis injustè &c. disseysivit talem uxorem suam; & p hoc terminabitur negotium, nisi aliquis ipsorum forte moriatur vel ambo ante captionem assisæ, quo casu si ambo vel uxor tantum, cadit omninò breve & assisa: si tantum vir, non ita: quia adhuc habebit uxor ingressum ad primam assisam, quod quidem non erit in casu converso, si uxor fecerit disseysinam & postea nupserit, tenet breve & pcedet assisa, licet prima facie videatur q cadere debeat, eo q sine viro respondere non deberet. Respondebit autem sine eo, sed utrum respondere debeat vel non, distinguendum est utrum ante impe-

together obtained a writ for an assise, and the wife dies before the holding the assise, the writ falls altogether and the assise, but if the husband dies before the holding the assise, the writ falls as in the first case, nor can she again proceed by herself, because they have been disseysed simultaneously and ought to be restored simultaneously. The wife, however, is assisted by a writ of entry, to wit, into which he had no entry except by a disseysine which he caused to her and to her aforesaid husband, and whence an assise of novel disseysine was instituted and a view of the land, &c. And the holding of the assise abated on account of the death of her aforesaid husband, or even without the aforesaid clause, although a writ had never been obtained in the lifetime of her husband, because the negligence of her husband ought not to be imputed to her, although her husband might have seasonably obtained it for himself. Likewise let it be that a widow woman, having been disseysed whilst she was independent without a husband, has obtained an assise, and before the holding of the assise has married, the writ falls, but not the assise, for another writ will be framed under her name and under the name of her husband, which will be of this character.

2. The form of a writ, when the husband never was in seysine, but the wife, when the wife cannot claim by herself without her husband.

So-and-so, husband and wife, have complained to us that such a person has disseysed his said wife; and by this the business will be determined, unless one of them by chance or both of them die before the holding of the assise, in which case if both or the wife only, the writ and the assise altogether fall: if the husband only, not so, because the wife will still have an entry to the first assise, which will not be so in the converse case, if the wife has caused the disseysine and afterwards married, the writ holds good and the assise will proceed, although at first sight it seems that it ought to fall, on the ground that she ought not to answer without her husband. But she shall answer without him; but whether she ought to answer or not, a distinction is to be made whether she

trationem nupserit vel post: si ante, cadit breve: si post, non cadit, quia nubere posset in fraudem. Idem erit si datum fuerit aliquod tenementum aliud tam viro quam uxori ad vitam uxoris, liberum tenementum non erit viri sed uxoris, & ideo illud & idem breve fiat in hoc casu. Eadem forma fieri posset (ut dicitur), si servus extra potestatem dñi in statu libero liberam uxorem duxerit cum libero tenemento, si dñs (cùm servum talem disrationaverit) liberam uxorem ejecerit de tenemento libero, cùm servus liberum tenementum habere non possit, nec ipsa audiri debeat sine viro, & quia tenementum illud non est ꝓquisitum servi, nisi tantum quòd habet inde custodiam: mulier recuperabit, non obstante exceptione servitutis. Et idem erit, et si non fuerit in statu libero, de acquisitis dico sed non de acquirendis. Item esto, quòd vir ratione hæreditatis uxoris sicut de communia pasturæ fecerit disseysinam sine uxore & præmoriatur, quæro an uxor teneatur post mortem viri de disseysina? sive in vita viri impetratum sit sive non? ad pœnam non tenebiť, quamvis teneať ad restitutionem. Item esto q̃ vir ita disseysitus fuerit, q̃ uxor relicto viro proprio alteri viro adhæserit, & qui simul se tenuerint in seysina ejecto primo viro, queritur qualiter ꝓspicietur ei? quia videtur q̃ sine uxore assisam portare non possit, & si uxor adjungať, sequiť q̃ ipsa non est disseysita cùm sit
f. 203. in possessione, non videtur quòd ad aliud recurrendū sit nisi ad forum ecclesiasticum, ut compellatur sequi

has married before or after the writ has been obtained; if before, the assise falls, if afterwards, it does not fall, because she could marry to defeat it. The same thing will result if any other tenement has been given as well to the husband as to the wife for the life of the wife, the freehold will not be that of the husband but of the wife, and on that account let the same writ be made in this case. In the same form it may be made (as it is said) if a serf beyond the power of a lord in a free *status*, has married a free wife with a free tenement, if the lord, when he has deraigned the said serf, has ejected the wife from the freehold, since a serf cannot hold a free tenement, nor can she be heard without her husband; and because that tenement is not the acquisition of the serf, excepting only that he has the custody of it, the woman shall recover notwithstanding the exception of serfdom. And the same thing shall result although he may not be in a free *status*, I speak of the things which have been acquired, not of the things which are to be acquired. Likewise let it be that a husband by reason of the inheritance of his wife as concerning a common right of pasture has caused a disseysine and died before his wife, I ask if the wife is responsible after the death of her husband for the disseysine? whether the writ has been obtained in the lifetime of her husband or not? She shall not be responsible for a penalty, but she shall be bound to make restitution. Likewise let it be that her husband has been so disseysed, that the wife having left her proper husband has adhered to another man and they have both together kept themselves in seysine, the other man having been ejected, it is asked in what way provision shall be made for him, because it seems that he cannot bring an assise without his wife, and if his wife's name be adjoined it follows that she is not disseysed, since she is in possession, it does not seem that f. 203.
he has any other resource than to apply to the ecclesiastical court, that she should be compelled to follow her

virū suū, & sic facta restitutione uxoris, fiat restitutio hæreditatis, vel fiat impetratio ꝑ breve de nova disseysina sub nomine utriusq̄, & si excipiatur cōtra assisam, quòd ei respondere nō debeat sine uxore, replicetur contra detentores de subtractione uxoris, & injusta detentione quasi de dolo & fraude, sicut fieri posset, si ꝑ parentes abducta esset & detenta, & unde nihilominùs ꝓcedet assisa, & ꝑ assisam judicabitur. Datur itaq̄ eodē modo mulieri querēti & petenti restitutionē contra dñm capitalē excipiētem de absentia viri, ubi viz. uxor ejecta fuerit ab aliquo maliciosè, cùm ꝓfectus fuerit vir in terrā sanctam, vel aliā longā peregrinationē, ut uxor interim disseysita nō remaneat, succurritur ei ꝑ officiu judicis de cōsilio curiæ, licet nō jure actionis, ut si ambo petant ꝑ assisam, & excipiatur quòd sine viro petere nō possit, excipiatur contra disseysitores de fraude & dolo.

3. De exceptionibus contra querentem et contra assisam.

Item habet tenens exceptiones contra querentem, ut si querens excommunicatus fuerit, & tenēs hoc docuerit ꝑ literas ordinarii patētes, oportebit querentem docere de absolutione. Itē excipere poterit cōtra ꝓsonā querentis, q̄ querēs actionē non habet nec querelā, eo quòd in possessione fuit nomine alieno ad quē ꝑtinet querela, sicut ꝓcurator, custos, firmarius, servus vel familia. Quo ꝓbato cadit breve & assisa versus tales, liceat ꝑteneat versus alios, qui habēt actionē & ꝑ aliud breve. Itē cōpetit exceptio cōtra querētē, ut si petat

husband, and so restitution of the wife having been made, restitution of her inheritance may be made, or a writ may be sued out of novel disseysine in the name of both, and if it be excepted against the assise, that he ought not to reply to him without his wife, a replication may be made against the detainers of her concerning the subtraction of his wife and her unjust detention as if by deceit and fraud, as might be the case if she had been abducted and detained by her relations, and hence nevertheless the assise shall proceed, and the matter shall be adjudicated by the assise. It is granted in the same way to the woman as plaintiff and claiming restitution against the chief lord objecting on the grounds of the absence of her husband, when the wife has been ejected craftily by some one, when her husband has gone off to the Holy Land or to some long foreign journey, that the wife may not remain in the meanwhile disseysed, she is helped through the office of the judge with the advice of the court, although not by a right of action, as if both should claim by an assise and it should be excepted that she could not claim without her husband, it may be excepted against the disseysors on the ground of fraud and deceit.

3. Of exceptions against the claimant and the assise.

Likewise the tenant has exceptions against the claimant, as if the claimant has been excommunicated, and the tenant has given evidence of this by letters patent of the ordinary, it will be necessary for the tenant to give evidence of his absolution. Likewise he may except concerning the person of the claimant, that the claimant has no right of action or claim, because he has been in possession in the name of another person to whom the complaint appertains, as his agent, keeper, farmer, serf, or servant. Upon proof of which the writ falls and the assise against the said persons, although it may hold good against others who have a right of action and by another writ. Likewise an exception may be raised against a claimant, as if the chief lord claims by an

p assisam dñs capitalis, ubi competit ei districtio, sicut inter dñm & tenentem suū p servitio debito, quia distringere debet, si ad hoc sufficiat, si autē non, recurrendum est ad superiorē, s. ad vicecomitē q vic. sit ei in auxilium, sed vice versa, inter tenentem & dominum bene jacet, scilicet ubi dñs tenentem suū de tenemento suo disseysiverit. Item competit exceptio contra assisam, quare debeat remanere, ex ipso dominio, sicut est inter dominum querentem & tenentem suum, si tenens suus ei redditum non reddiderit. Jacet tamē inter tenētem querentem, & dominū ejicientem, sicut inter alias quascunq; psonas. Est enim redditus quandoq; liberū tenementū, quandoq; pvenit ex aliquo libero tenemēto p homagio & servitio, vel si cū quis liberū tenemētū habeat, de illo tenemento dederit alicui redditum vel sine tenemento, vel cum tenemento constituerit alicui redditum p se & hæredibus suis, pro aliqua servitute habenda in alieno. Si autem debeat quis redditum dño suo vel servitiū, & illud omninò nō dedixerit, sed forte nō solverit, non jacet assisa inter dñm & tenentem suum, sed districtio tantum, si dominus distringere possit & velit, si autem non possit cùm velit, recurrat ad auxilium domini regis quòd præcipiat vicecomiti quòd sit ei in auxilium, & unde non competit ei assisa, quamdiu distringere possit per se vel per superioris auxilium. Cùm tenens ad tuitionem sui excipiat contra assisam quòd assisa procedere non debeat de servitio, quia tenetur de tali, statim propter cognitionem cessat districtio & cadit assisa, sed non ut iste contra quem assisa arramata est quietus recedat, sed per hoc quòd cognoscit quòd de eo tenet in judicio, sine alio brevi præcipiatur vic.

Britton ii. ch. xviii. § 10.

assise, where he might proceed by a distraint, as between a lord and his tenant for a service which is due, because he ought to distrain, if there be sufficient for this, but if not, recourse must be had to a superior, that is, to the viscount, that the viscount should help him, but conversely, it lies well between a tenant and his lord, to wit, where the lord has disseysed the tenant from his tenement. Likewise an exception may be raised against an assise, that it ought to be stayed from the lordship itself, as in the case between a lord as claimant and his tenant, if his tenant has not paid him his rent. It lies, however, between a tenant as claimant and a lord who has ejected him, as between any other persons whatsoever. For the rent is sometimes a freehold, sometimes it is derived from a freehold for homage and service, or if when a person has a freehold he has granted from that freehold a rent to any one, without the tenement, or he has appointed a rent to some one with the tenement for himself and his heirs, for some service to be performed in another person's [domain]. But if any one owes a rent to his lord or a service, and has not absolutely denied it, but by chance has not paid it, an assise does not lie between the lord and his tenant, but a distraint only, if the lord can and will distrain, but if he cannot when he wills, let him have recourse to the lord the king that he enjoin the viscount to give him assistance, and hence he is not entitled to an assise, as long as he can distrain by himself or by the assistance of a superior. When the tenant excepts against an assise for his own protection, that an assise should not proceed concerning a service, because he is bound by the said service, forthwith on account of the acknowledgment the distraint ceases and the assise falls, but not so that he against whom the assise has been commenced shall go away quietly, but on the ground that he acknowledges in judgment that he holds from him, let it be enjoined upon the viscount without any further writ that he

quòd distringat confitentem propter cognitionem quòd
f. 203 b. solvat servitiū debitum, & q̃ vic. sit in auxilium ad distringendū si opus fuerit, & si contentio fuerit de quantitate vel qualitate servitii, hoc remaneat inter partes discutiendū. Si autē tenēs suus ipsū omninò deadvocaverit q̃ nihil tenuerit de eo, tūc statim cessat districtio, ꝑpter q̃ dicūt quidā, q̃ dñs debet petere terrā in dñico, nihilominus tamē videtur quod locū habeat assisa novæ disseysinæ de libero teñto, cùm deficiat districtio, quia revera, licet tenens sit quātū ad dñm, facit se nō tenētē ꝑ deadvocationē quantū ad seipsum, & sic jacebit assisa: quia esto quòd extraneus nō dñs ꝑ vim compellat tenentē, quòd ei solvat redditum, vel quòd dño nō solvat cōtra volūtatē tenētis, talis extraneus dñs[1] facit disseysinā & nō tenēs quasi de libero teñto dñi.[2] Et illud idem erit, si tenens de voluntate sua solvat extraneo. Sed versus extraneum cōpetit assisa dño, si dñs voluerit, & contra tenentē districtio, cùm dñm non deadvocaverit, sed altero istorū cōtentus erit. Si autem ꝑ districtionem versus tenentem recuperaverit, cùm deadvocatus non fuerit, vel, cum deadvocatus fuerit, recuperaverit redditū ꝑ assisam, vel ille qui deadvocavit gratis solvit non dño, uterq̃ teneatur de servitio dño ꝑ necessitatē, & nō dño ꝑpter voluntatē, & ita fiat districtio sive plures sint medii sive nō, quia capitalis dñs semper se capiat ad feodum suum, & tenens ad suum warantum. Districtio tamē dñi debitum modum non excedat: quia semper jacet districtio, quicunq̃ fuerit in possessione, custos, servus, creditor, firmarius

[1] "domino," MS. Rawl. C. 160.
[2] "domini," omitted MS. Rawl. C. 160.

distrain against him as admitting it on account of the acknowledgment that he should pay the service due, and f. 203 b. that the viscount be ready to assist him in the distraint, if it be necessary, and if there should be a contention between the parties concerning the quantity or the quality of the service, this should remain for discussion between the parties. But if his tenant has absolutely disavowed him, that he holds nothing from him, then the distraint ceases at once, for which reasons some say that the lord ought to claim the land in domain, nevertheless, however, it seems that an assise on novel disseysine concerning the freehold has a place, when the distraint fails, because in reality although he be a tenant as regards the lord, he makes himself not to be a tenant by his disavowment, as regards himself, and so the assise will lie: for let it be that a stranger, not the lord, compels by force a tenant, that he should pay him rent, or that he should not pay it to the lord, against the will of the tenant, the said stranger lord causes the disseysine, and not the tenant, as it were from the freehold of the lord. And the same thing will result if the tenant of his own will pays [the rent] to a stranger. But against the stranger the lord is entitled to an assise, if the lord wishes, and against the tenant to a distress, when he has not disavowed the lord, but will be content with either of them. But if he shall have recovered by a distraint against his tenant, when he has not been disavowed, or when he has been disavowed, has recovered by an assise, or he who has disavowed him has gratuitously paid to the person not the lord, let each be bound to the service to the lord by necessity, to the non-lord by willingness, and so let there be a distraint, whether the mesne parties are more than one or not, because the chief lord may always satisfy himself up to his fee, and the tenant up to his warranty. But the distraint of the lord should not exceed due moderation, because a distraint always lies, whoever may be in possession, keeper, serf, creditor,

vel alii. Item si aliquis tenentem ejecerit, domino cōpetit districtio & tenēti disseysina. Si autē sit redditus, qui detur alicui ex tenemēto in feodo sibi & hæredibus suis, aut datur cū districtione vel sine: si autem cum, tunc ut supra: si autem sine, tunc assisa.
Cf. f. 261 b. Si autem redditus sit proveniens ex camera, tunc nec districtio, nec assisa, sed per breve de annuo redditu. Item si redditus sit proveniens ex tenemento, solvendus p manus alterius quàm tenentis, adhuc subesse poterit districtio vel disseysina. Item competit redditus alicui non aliqua ratione prædicta, sed ratione alicujus rei intermediæ, ut si percipiat redditum aliquem ratione alicujus hūdredi, cùm quidā finem fecerint pro sectis, & hujusmodi, non poterit quis assisam habere ratione talis redditus, nisi habeat hundredum & qui habet hūdredum, ille redditum habeat, donec hundredum ab eo convincatur, & sic fiat de similibus.

Cap. XXV.

1. De exceptione, quæ competit contra querentem ex persona tenentis.

Competit etiam tenenti exceptio ex persona sua propria contra querentem, ut si dicat quòd ipse non fecit disseysinam, si disseysina ibi fuerit, sed alius antecessor vel prædecessor suus qui mortuus est, & ipse non utitur alia seysina quam ipsi fecerunt, & cùm injuria personalis sit, ad hæredes non extenditur, nec ad successores, nec eodem modo cùm personalis sit, quia pœna tenebit suos autores. Igitur alia actione opus erit per breve de ingressu. Item si dicat, quòd ipse non fecit disseysinam sed alius, licet rem

farmer or others. Likewise if any one has ejected the tenant, the lord is entitled to distrain, and the tenant is entitled to the disseysine. But if there be a rent, which is granted to any one out of the tenement, in fee to himself and his heirs, it is either granted with a power to distrain or without it; but if with [such a power], then [proceedings may be taken] as above, but if without such a power, then proceedings must be by way of an assise. But if the rent be for a chamber, then there will neither be [place for] a distraint nor an assise, but by a writ for an annual rent. Likewise if the rent be forthcoming from a tenement to be paid by the hand of another than the tenant, there may be still in reserve the right of distraint or [a plaint] of disseysine. Likewise a person may be entitled to a rent not for any of the grounds above said, but by reason of something intermediate, as if he shall receive a rent by reason of any hundred, when some persons have made a fine for suits and such like: a person cannot have an assise by reason of such a rent, unless he has the hundred, and who has the hundred, he should have the rent, until the hundred be convicted by him, and so it should be done in like cases.

Chapter XXV.

1. Of an exception, which may be raised against a claimant on the part of the person of the tenant.

The tenant may also raise an exception on the part of his own person against the claimant, as if he should say that he himself did not cause the disseysine, if any disseysine was done, but some ancestor or predecessor of his, who is dead, and that he himself enjoys no other seysine than they enjoyed, and since the injury is personal, it does not descend to heirs, nor to successors, nor in the same manner, since it is personal, because the penalty will bind its own authors. Therefore there will be need of another action through a writ of entry. Likewise if he should say, that he did not cause the disseysine, but

f. 204. habeat disseysitam, videndum erit utrum illam habeat vitiosam, s. statim post disseysinam, sive de volūtate primi & principalis disseysitoris, sicut ex aliqua justa causa acquisitionis, sive ad unum ꝑvenerit sive ad plures, de manu in manum sive cōtra voluntatem primi disseysitoris ꝑ disseysinā, vel ꝑ intrusionē: quibus casibus, sine primo & principali disseysitore non respōdebit, quia ꝑ se disseysinā non fecit sed cum alio, secundum quod videri poterit, si rex disseysinam fecerit & postea rem ad aliū statim transtulerit, quilibet est disseysitor principalis, rex primus & principalis ꝑpter factum, & alius similiter principalis ꝑpter ingressum; & quamvis principalis sit, tamen sine rege non respondebit, quia simul cum eo fecit disseysinam. Item nec vice versà, primus & principalis non respondebit sine secundario, quia sine eo restituere non potest. Itē si ꝑ longū intervallum post disseysinā ad alios res pervenerit, sive ad unum sive ad plures successive, tales non sunt principales disseysitores, licet sunt rei vitiosæ injusti detentores, ut supra plenius de transgressionibus.[1]

Supra, cf. ch. xiv. et xv.

Cap. XXVI.

1. Quis dici debeat principalis disseysitor, quis secundarius.

Ad majorem autē evidentiā videndū est ꝑ exemplū, quis primus & principalis sit disseysitor, & quis nō principalis sed secundarius, eo ꝙ seysinā habuerit rei disseysitæ post disseysinā nō ꝑpriā. Et sciendum ꝙ facit quis disseysinā nomine ꝑprio & aliquādo nomine alieno, sicut ꝑcurator, servus, vel familia. Itē sunt

[1] "translationibus," MSS. Rawl. C. 160 and 159; MS. Godbold (Gray's Inn)

another person did, although he may have the thing which was the subject of the disseysine, it will have to be seen whether he has it affected by vice, that is, immediately after the disseysine, or with the good will of the first or principal disseysor, as from some just cause of acquisition, whether it has passed to one or to several persons, from hand to hand, or against the will of the first disseysor by a disseysine, or by an intrusion; in which cases he shall not answer without the first and principal disseysor, because he has not caused the disseysine by himself, but with another, according to what may be seen, if the king has caused a disseysine and has afterwards transferred the thing forthwith to another, each is the principal disseysor, the king as the first and the principal on account of the act done, and the other similarly is a principal on account of his entry; and although he be a principal, nevertheless he shall not answer without the king, because he made the disseysine in conjunction with him. Likewise non-conversely, the first and principal shall not answer without the secondary, because he cannot make restitution without him. Likewise if the thing has passed into the hands of others during a long interval after the disseysine, whether to one or to several successively, such persons are not principal disseysors, although they are unjust detainers of a vicious thing, as has been stated above more fully concerning trespasses. f. 204.

Chapter XXVI.

1. Who ought to be called the principal disseysor, and who the secondary.

But for greater clearness it is to be seen by an example who is the first and principal disseysor, and who is not the principal but the secondary, on the ground that he has had seysine of the thing disseysed after a disseysine not of his own doing. And it is to be known that a person effects a disseysine in his own name and sometimes in another person's name, as an agent, serf,

disseysitores primi & principales, & sunt disseysitores secundarii. Item sunt primi & principales disseysitores & sunt secundarii rei disseysitæ injusti detentores, unus vel plures post disseysinam, & non sunt disseysitores. Item sunt primi & prīcipales disseysitores p̄ se & sine aliis, anteq̄ rē disseysitā ad aliū trāstulerint de volūtate vel cōtra volūtatē, & cùm trāslata fuerit, alii incipiūt esse principales disseysitores vel detētores, nō p̄ se, sed cū aliis primis & principalibus. Itē sunt primi & principales disseysitores quoad primum & principalē disseysitorem & quoad primū disseysitum, cùm statim post primā disseysinā primum & principalem disseysitorē disseysiverint, quia tenētur de disseysina tam primo disseysito p̄pter recētē causam disseysinę, quā primo & principali disseysitori p̄pter cōmodū possessionis. Si autē post intervallū disseysinā fecerit, nō tenet primo disseysito, nisi tātùm ad restitutionē, & nō ad pœnā, secūdo vero disseysito, & disseysitori tenent ad utrūq̄, & refert utrū fiat trāslatio ante impetrationē brevis vel post. Itē primus & principalis esse poterit unus per se, & alii secundariò, plures sicut unus, ut si post primam disseysinam res translata fuerit ad plures, sive de volūtate primi disseysitoris, sive contra voluntatem. Et eodem modo possunt esse plures primi & principales disseysitores quoad injuriam, & principales disseysitores quoad rem post partitionem. Item possunt esse disseysitores, licet nón principales, nec primi nec secundarii sicut sunt illi qui sunt in auxilio & consilio, & ad quos nihil pervenerit de re disseysita. Item facit quis dis-

or servant. Likewise there are first and principal disseysors, and there are secondary disseysors. Likewise there are first and principal disseysors, and there are secondary unjust detainers of the thing disseysed, one or more, after the disseysine, and they are not disseysors. Likewise there are first and principal disseysors by themselves and without others, before they have transferred the thing disseysed to another with their will or against their will, and when it has been transferred, others begin to be the principal disseysors or detainers, not by themselves, but in conjunction with other first and principal disseysors. Likewise there are first and principal disseysors, as regards the first and principal disseysor and as regards the first person disseysed, when immediately after the first disseysine they have disseysed the first and principal disseysor, for they are liable as well to the first person disseysed on account of the recent cause of disseysine, as to the first and principal disseysor on account of the advantage of possession. But if he has made a disseysine after an interval, he is not liable to the first person disseysed, except only as regards restitution, and not as regards a penalty, but they are liable to the second person disseysed and to the disseysor as regards both, and it is of importance whether the transfer has been made before or after the suing out of the writ. Likewise the first and principal disseysor may be one person by himself, and the others who are secondary may be several or one, as if after the first disseysine the thing has been transferred to several, whether with the will of the first disseysor or against it. And in the same manner there may be several first and principal disseysors as regards the injury, and principal disseysors as regards the thing after partition. Likewise there may be disseysors although not principals, neither first nor secondary, as for instance, those who are helpers and counsellers, and to whom none of the disseysed thing has come. Likewise a person effects a

seysinam non nomine proprio (ut prædictum est), sed nomine alieno, ut si procurator, servus, vel familia
f. 204 b. nomine dominorum fecerint disseysinam, ipsi semp erunt primi & principales, quousq; dñi eorū factum eorū advocaverint & disseysinam, vel deadvocaverint. Si autem advocaverint, tunc incipiūt esse principales disseysitores, & primi & principales disseysitores ꝑpter seysinam rei disseysitæ, & primi, eò q ratum habent factum suorum, quia ratihabitio retro trahitur ad primum factum suorum, & sic incipiunt esse primi & principales, & sui desinunt esse principales. Si autem factum suorum deadvocaverint, & cùm interpellati fuerint qualitercunq; ab aliquo homine vel alio modo, factum non emendaverint, adhuc tenentur, dū tamē si præsentes sint & se gratis posuerint in assisam, licet in brevi non nominentur. Si autem factum suorum emendaverint sive ante impetrationem sive post, dum tamen ante captionem assisæ, à pœna disseysinæ liberabunt se & suos. Si autem in remotis agant domini, ita quòd interpellari non possint, nec aliquid sciverint de disseysina, ꝑpter hoc non remanebit assisa, in odium disseysitorum, & remanebunt disseysitores primi & principales: ita q si assisa faciat pro eis remaneāt domini sui in seysina de facto suorum. Si autem cōtra eos, recuperabit querēs, & dominus cùm redierit, si factum eorum advocaverit, incidit in pœnam disseysinæ cum suis, & si viderit sibi expedire, agat de convictione. Si autem antequam redierint & advocaverint disseysinam moriantur domini & succedunt hæredes, adhuc possunt hæredes factum suorū advocare vel de-

disseysine not in his own name (as aforesaid), but in another person's name, as if an agent, serf, or servant have effected a disseysine in the name of their lords, they themselves will always be the first and principal f. 204 b. disseysors, until their lords have avowed their act and the disseysine, or have disavowed them. But if they have avowed them, then they begin to be the principal disseysors, and the first and principal disseysors, on account of their seysine of the thing disseysed, and the first because they have ratified the act of their dependants, because ratification reflects back on the first act of their dependants, and so they begin to be the first and principal, and their dependants cease to be the principal. But if they have disavowed the act of their dependants, and when having been interpellated, howsoever, by some man or in some manner, they have not made amends for the act, they are still liable, provided however that they are present and have gratuitously placed themselves on the assise, although they are not named in the writ. But if they amended the act of their dependants either before the suing out of the writ or before, provided it be before the holding of the assise, they shall deliver themselves and their dependants from the penalty of the disseysine. But if the lords are in parts remote, so that they cannot be interpellated, nor can know anything about the disseysine, the assise shall not on that account be stayed, in hatred of the disseysors, and they shall remain the first and principal disseysors; so that if the assise makes in their favour their lords may remain in seysine from their act. But if against them, the claimant shall recover; and the lord when he shall have returned, if he avows their act, he will incur the penalty in conjunction with his dependants, and if he sees it to be expedient, will proceed to obtain a conviction (of perjury). But if the lords should die before they have returned and avowed the disseysine, and their heirs succeed, the heirs may still avow the act of their

advocare ante captionem assisæ, quia eorum factum ab antecessoribus non fuit advocatum, quòd si esset, ita esset primus & principalis disseysitor, & teneretur & ad pœnam & ad restitutionem, & sic non transiret disseysina usq; ad hæredes quoad pœnam, quamvis quoad restitutionem, p breve de ingressu. Sed cùm non advocavit, sic transit advocatio disseysinæ usq; ad hæredes, ut sic advocent factum vel non advocent, & sic teneantur de injuria vel non teneantur. Quod autem dictum est de domino & hærede suo, dici poterit de abbate & priore mortuo & eorum successoribus. Si autē abbates & priores vivi sint, & anteq̃ advocaverint depositi, vel ad alias dignitates trāslati, adhuc erit idē in psonis successorū, q̃ diciť superius in personis hæredum, sive impetratū fuerit cōtra eos sub pprio nomine appellatiōis, vel sub nomine dignitatis, vel sub utroq;. Si autē ante depositionē vel mutationē advocaverint disseysinā, ipsi tenētur post depositionē vel mutationē, & ita q̃ si ante depositionē vel ante mutationē impetratū sit cōtra eos, pcedat assisa sub nomine prioris vel abbatis etiā post depositionē vel mutationē. Si autē post depositionē vel mutationē fuerit impetratū, cū advocarēt, tenēť tamē ex ratihabitione & cōveniendi sunt p breve novæ disseysinæ, nō sub nomine abbatis vel prioris sed p tale breve. Questus est nobis talis, q̃ talis monachus vel canonicus quondā abbas de tali loco & tales injustè &c. Et idē trāslat^{9} fuerit, s. episcop^{9} talis &c. Si quis autē recēter ingressus erit post disseysinā flagrāte malificio, nō est mirū si teneať de disseysina, cū res in se prop-

dependants, or disavow it before the holding of the assise, because their act has not been avowed by their ancestors, because if it were, he would be the first and principal disseysor, and would be liable both to a penalty and to restitution, and so the disseysine would not pass on to the heir as regards the penalty, although it would as regards the restitution by a writ of entry. But when he has not avowed it, the avowal of the disseysine so passes to the heirs that they may so avow or disavow the act, and so be liable for or not liable for the injury. But what has been said concerning a lord and his heir, may be said of a dead abbot and prior and their successors. But if the abbots and priors are alive, and before they have avowed the act they have been deposed or translated to other dignities, the same thing will happen as regards the persons of their successors, as has been above stated as regards the persons of heirs, whether a writ has been sued out against them under their own name by which they are called, or under the name of their dignities, or under both. But if before their deposition or translation they have avowed the disseysine, they are themselves liable after their deposition or translation, and so that if a writ has been sued out against them before their deposition or before their translation, the assise shall proceed in the name of the prior or abbot after their deposition or translation. But if a writ has been sued out after their deposition or translation, when they have avowed the act, they are liable by their ratification, and they are to be convened by a writ of novel disseysine, not under the name of abbot or prior, but through a writ of this kind: So-and-so has complained to us that such a monk or canon, formerly abbot of such a place, has unjustly [disseysed] so-and-so, &c. And the same if he has been translated, to wit, such a bishop, &c. But if any one has recently entered [upon the land] after the disseysine whilst the misdeed is flagrant, it is not surprising if he is liable for the disseysine, since the

ter disseysinā est vitiosa. Scit enim aut scire debet quę vel qualis res sit quā ingrediť, si vitiosa p disseysinā, sicut ille qui rē emit scire dēbet utrū libera sit vel serva p īpositionē sive cōstitutionem servitutis. Item utrum sit onerata vel nō. Item utrum cōtentiosa sit p diligentem impetrationem & diligentem prosecutionem, & sive sic, sive nō sic, semper tenebitur accipiens ad pœnam, vel ad restitutionem, vel ad utramq. Et sciendum q diligens est ille, qui incōtinenti post disseysinā impetraverit, q quidem nō valebit, nisi diligenter post impetrationem fuerit ꝑsecutus. Diligens enim esse poterit in impetratione & negligens in ꝑsecutione, vel diligens vel negligens in utroq. Et si in utroq diligens fuerit, non præjudicabiť ei, quāvis captio assisę ad tempus differať. Multas vero alias exceptiones tenens habere poterit ex ꝑsona sua, sicut inferi de exceptionib pleni diceť.

f. 205.

Cap. XXVII.

1. Exceptio contra assisam, si injuste et sine judicio.

Si autem nulla sit exceptio quæ competat tenenti ex ipsa jurisdictione vel ex ipso brevi, vel ex personis partium, videndum erit si aliqua cōpetat ex ipso facto, continetur enim in brevi, s. Questus est nobis talis, talis injuste & sine judicio disseysivit talem. Quæ quidem verba (injuste & sine judicio) accipi possunt simul conjunctim, vel divisim sive disjunctim, scilicet injuste vel sine judicio. Injuste quia sine judicio, sine judicio quia disseysitor nullam habuit actionem, vel cûm actionem habuerit, noluit judicium expectare sed

Britton, ii. ch. xix. § 1. Fleta, 241.

thing is vicious in itself on account of the disseysine For he knows or he ought to know what and what kind of thing it is which he enters upon, if it be vicious through a disseysine, just as he who buys a thing ought to know whether it is free or servile through the imposition or constitution of a servitude. Likewise whether it be burdened or not. Likewise whether it be contentious through a diligent suing out of a writ, or a diligent f. 205. prosecution of it, and whether so or not so, the receiver will always be liable to a penalty, or to restitution, or to both. And it is to be known that he is diligent, who has immediately after the disseysine sued out a writ, which indeed will not avail, unless he has prosecuted it diligently after suing it out. For a person may be diligent in suing out a writ and negligent in the prosecution of it, or diligent or negligent in both: and if he has been diligent in both, it shall not be prejudicial to him, although the holding of the assise be deferred for a time. But the tenant may have many other exceptions in respect of his own person, as will be said more fully below on the subject of exceptions.

Chapter XXVII.

1 An exception against an assise, if it be unjustly and without a judgment.

But if there be no exception, to which the tenant is entitled, arising out of the jurisdiction or out of the writ, or out of the persons of the parties, we must see if he is entitled to any upon the act itself, for it is contained in the writ, to wit, so-and-so has complained to us that such a person has unjustly and without a judgment disseysed the said so-and-so. Which words (unjustly and without a judgment) may be taken together conjointly, or separately and disjointly, to wit, unjustly or without a judgment. Unjustly, because without a judgment, without a judgment, because the disseysor had brought no action, or when he brought an action was unwilling to wait for a judgment, but made himself

fecit se justiciarium, & potiùs uti voluit viribus quàm judicio. Juste, facie prima ꝑpter jus, sed injuste ꝑpter injuriam, quia sine judicio: vel injuste, quia licet cum justo judicio sed â non judice, & ideo injuste, quod idem est quia non habet executionem, vel si habeat, quod idem est ut si justiciarii[1] vel curia alicujus (licet jurisdictionem habuerit) scienter male judicaverit vel ignoranter, vel saltem aliquis qui non habet jurisdictionem nec cohertionem, si velit seysinam suam executioni demandare, & sic injuste quamvis cum judicio, simul & conjunctim: vel injuste per se quātum ad disseysitum, qui justè seysitus fuit, & injustè disseysitus, vel injustè quantum ad disseysitorem, qui sine judicio disseysivit. Item injuste quantum ad disseysitum, qui[2] sine judicio ejicitur, licet juste ab eo qui jus habet prima facie, tamen injuste quia sine judicio, & quamvis verus dñs jus habeat in re & juste ejiciat, tamen injuste ejicit, quia sine judicio, & quia propriis viribus reposcit, quod per judicem reposcere debuit, ideo ꝑ judicium restituat ꝙ sibi sine judicio viribus usurpavit, nunquā postmodum nisi vix tantum, super proprietate erit audiendus, & hoc si post tempus ejiciatur, quod sufficere possit pro titulo, ad hoc quòd sine brevi non teneatur tenens respondere. Secus autem esset, si incontinenti rejiciat disseysitorem. Item injuste, quod sine judicio dici poterit quantum ad disseysitorem, si ab alio fuerit ejectus qui jus non habet, sive incontinenti sive post tempus propter commodum possidendi, cùm ille qui in possessione fuerit juste vel injuste, nomine proprio qualitercunque & non alieno,

[1] "justitiarius," MS. Rawl. C. 160. | [2] "quia," *id.*

the justiciary, and chose rather to employ force than judgment. Justly, on first aspect, on account of right, but unjustly on account of tort, because without a judgment: or unjustly, because although with a just judgment, but not by a judge, and on that account unjustly, which is the same, because he has no power of execution, or if he has, which is the same as if the justiciaries or the court of any one, although it has jurisdiction, has ill judged knowingly or ignorantly, or at least some one who has not jurisdiction nor coercion, if he wishes to commit his seysine to execution, and so unjustly although with a judgment, together and conjointly: or unjustly as regards himself, as regards the person disseysed, who has been justly seysed and unjustly disseysed, or unjustly as regards the disseysor who has disseysed him without a judgment. Likewise unjustly as regards the person disseysed, who is ejected without a judgment, although justly by him who has right on first aspect, nevertheless unjustly because without a judgment, and although the true lord has the right in the thing and justly ejects, nevertheless he unjustly ejects, because without a judgment, and because he reclaims by his own force, what he ought to have reclaimed through the judge, on that account he must restore through a judgment what he has usurped for himself by force without a judgment, and he will never afterwards have a hearing upon the subject of property, or at least with great difficulty, and this, if he be ejected after some time, which might serve for a title, so far as the tenant is not bound to answer without a writ. But it would be otherwise, if he forthwith repelled the disseysor. Likewise unjustly, which without a judgment may be said as regards the disseysor, if he has been ejected by another who has no right, whether forthwith or after a time on account of the advantage of possession, since he who may be in possession whether justly or unjustly in his own name in any manner whatsoever, and not in another person's name, has more right in the

plus juris habeat in possessione quàm ille, qui est extra possessionem & jus non habet. Et unde si cùm talis esset extra possessionem & petere vellet versus injuste possidentem, non habet actionem. Et unde si sine judicio viribus ejiciat injuste possidentem, cûm
f. 205 b. per judicium non possit, merito debet ei per judicium restituere, q̃ sibi sine judicio & ideo injustè viribus usurpavit, nulla obstante exceptione p̃prietatis, vel liberi teñti cõtra spoliatum. Item si quis in seysina fuerit p̃ judicium, tunc refert utrum judicium justum fuerit vel injustum, q̃a si justum, justè possidebit, q̃ juste possidet qui prætore autore possidet, justi[1] tamen autoritate interponente. Si autẽ autoritas injustè interposita fuerit, injustum erit judicium, & ideo revocandum, & nõ solũ facit curia, quæ judicat, injuriã & disseysinã, verum etiã ballivus curiæ qui tale judicium injustum fuerit execut^{9}, & nõ solum ballīv^{9}, verum etiã & dñs vel ali^{9}, qui ex tali judicio nactus fuerit possessionẽ, nõ tamẽ ad pœnã, sed ad restitutionẽ, q̃a liberabit â pœna, qui immunis est â disseysina. Hæc autem tenenda sunt, si de tali judicio in curia facto constiterit p̃ examinationem, vel partium cõfessionem, vel alio modo. Si autem taliter cõstare nõ possit, vel juratores assisæ dubitaverint, vel nihil sciverint de judicio, præsumi tamẽ debet, q̃ benê judicaverit,[2] donec p̃batum sit cõtrarium, q̃a in meliorem partem declinare debet interpretatio, ita q̃ querens nihil capiat p̃ assisã, sed sibi p̃quirat (si velit) versus curiã de injusto ju-

[1] "juste," MS. Rawl. C. 160.

[2] "quod curia bene judicaverit," MS. Rawl. C. 160.

possession, than he who is out of possession and has no right. And hence if such an one were out of possession and wished to claim against a person unjustly possessing, he would have no right of action. And hence if he without a judgment ejects by force a person unjustly possessing a thing, since he could not do it by a judgment, he ought deservedly to restore to him by a judgment, what he has usurped to himself without a f. 205 b.
judgment and therefore unjustly by force, there being in the way no exception of property or of freehold against the person despoiled of it. Likewise if any one has been in seysine by a judgment, then it is of importance whether the judgment has been just or unjust, because if [it has been] just, he will justly possess, because he possesses justly, who possesses by the authority of the magistrate, his authority, however, being justly interposed. But if his authority has been unjustly interposed, the judgment will be unjust and therefore to be recalled, and not only does the court, which judges, cause an injury and a disseysine, but also the bailiff of the court who executes such an unjust judgment, and not only the bailiff, but also the lord and any other person, who has by such a judgment obtained possession, not however as respects a penalty, but as respects restitution, because he who is free of the disseysine shall be liberated from the penalty. But these things are to be maintained, if it has been ascertained by an examination, or by the confession of the parties, or in any other way, that such a judgment has been made in court. But if such a fact cannot be ascertained, or the jurors of the assise have doubted, or have known nothing of the judgment, it ought however to be presumed that it has been well judged, until the contrary be proved, because the interpretation ought to incline towards the better part, so that the claimant should take nothing by the assise, but should provide for himself (if he chooses) against the court concerning an unjust judgment, and the court

dicio, & q sum̄oneaṫ curia q recordari faciat &c. & habeat recordum, & q melius est secundum Martinum q præcipiaṫ vic. q ipse præcipiat dño vel ballivo curiæ, q recordari faciat, & recordum habeant ad certum diem p tale breve. Et de hac materia habetis in itinere ipsius Martini de Pat. in com̄ Suff. año regis H. 12, assisa novæ disseysinæ, si Joceanus de Hesture,[1] ubi dictum fuit q ille, de quo querebaṫ, q p cōsiderationem talis curiæ recuperavit seysinā suam. Et q nec partibus nec juratoribus fides adhiberi debet in hac parte sine recordo, habetis de itinere ipsius M. ad assisas novæ disseysinæ capiendas & gaolas deliberandas in com̄ tali. Assisa novæ disseysinæ, si Laurentius carnifex. Qualiter autem sum̄oneri debeat curia, & quo modo videndum. Et sciendum q qui sic recuperaverit p judicium vocare debet curiam ad warantum & de judicio illo p auxilium curiæ dñi regis, sive hoc fuerit in itinere justiciariorum sive corā justiciariis ad hoc specialiter cōstitutis, & dabiṫ partibus dies de die in diem, & interim fiat recordum & veniat. Item injustè, quāvis justò judicio, ut si ab eo, qui jurisdictionem nō habet, judicatum fuerit benè sive malè, cum nō possit judicium suum executioni demandare, & si illud fuerit qualitercunq; execut^{9}, facit disseysinā injustè, quāvis justè judicaverit, q̃a judex ecclesiastic^{9} jurisdictionem nō habet nec coërtionem in laico feodo, nec in aliis quæ p̄tinent ad coronā & dignitatē dñi regis. Item poterit intervenire justum judiciū ad initio, ut in destructionib^{9}[2] faciendis, & vertiṫ ex post facto in disseysinā, sicut in buṙgagiis, terris, tenementis & tenuris

[1] "Josceanus de Agesterne," MS. Rawl. C. 160.

[2] "destrictionibus," MS. Rawl. C. 160.

should be summoned to cause a record to be made, &c., and to produce the record, and what is better, according to Martin [de Pateshull], that he should enjoin the viscount, and that the viscount should enjoin the lord or the bailiff of the court, that he cause a record to be made, and produce the record by such a day by a writ of this kind. And concerning this matter you have in the iter of Martin de Pateshull himself, in the county of Suffolk, in the twelfth year of the reign of king Henry, an assise of novel disseysine, if Joceanus de Hesture, where it was said that he concerning whom he complained had recovered his seysine by the decision of such a court. And that faith is not to be given to the parties nor to the jurors in this part without a record, you have in the iter of the said Martin to hold assises of novel disseysine and of gaol delivery in the said county, an assise of novel disseysine, if Laurentius the butcher. But in what way the court ought to be summoned, and in what manner, is to be considered. And it is to be known that he who has so recovered by a judgment ought to call the court to warrant and concerning that judgment, by the help of the court of the lord the king, whether this be in the iter of the justiciaries, or before justiciaries specially appointed for the purpose, and there shall be given a day from day to day, and in the mean time let a record be made and come. Likewise unjustly, although by a just judgment, as if judgment has been given by him, who has no jurisdiction, well or ill, since he cannot enforce his judgment to execution, and if he has executed it in any way, he causes a disseysine unjustly, although he has judged justly, because an ecclesiastical judge has no jurisdiction nor coercion over a lay fee, nor in other things which pertain to the crown or to the dignity of the lord the king. Likewise there may intervene a just judgment from the commencement, as in causing distraints, and it is turned afterwards into a disseysine, as in burgage tenures, lands, tenements, and exterior ten-

exteriorib⁹, ut si dñs p considerationem curię suę p defectu servitii ceperit tenementum tenentis sui in manum suam, sicut simplex namiū, donec de redditu fuerit satisfactū, sed cū talis, cuj⁹ tenemētū fuerit, optulerit de satisfaciēda de redditu & arreragiis, restitui debet ei possessio, & si dñs hoc recusaverit, ex tunc erit manifesta disseysina. Et de hac materia satis inveniri poterit in itinere predicti M. in coñ Kāc. año regni H. 12. Item esto q quis intraverit tenementum alicujus p cōventionem, & videtur q hoc facit injustè, q̃a
f. 206. sine judicio & antequam sciaī veritas de conventione, & unde videī q querens recuperaret p assisam, sed revera non recuperabit, quia licet prima facie videatur q assisa locum habere debeat, eliditur tamen assisa p exceptionem conventionis, cùm talis per conventionem fuerit in possessione, & multò fortiùs si quis fuerit in possessione ad terminum & retinuerit per conventionem, & contra conventionem fuerit ejectus. Si autem p vim teneatur extra, habet actionem ex conventione, & sic parit conventio exceptionem possidendi, & ei qui non possidet actionem. Et ideo habet ille, qui nō possidet, actionem, qui possidet, exceptionem, eo q ingreditur possessionem de voluntate querentis, q̃a hoc semel voluit, licet postmodum velle desinat, quia sufficit semel voluisse, nec dissolvi possit mutua voluntas, nisi ex mutua voluntate contraria. Et unde in omnibus videndum erit an satisfactum sit conventioni vel non, & ita si ille, qui queritur, contentus esse debeat vel non. Et si convenerit q ingredi possit, ut supra de donationibus pleniûs, & sic incidit

ures, as if the lord by the decision of his court for the failure of a service has taken the tenement of his tenant into his own hand, as a simple distress, until he has been satisfied for the rent, and when so-and-so, whose tenement it is, has offered satisfaction for the rent and the arrears, the possession ought to be restored to him, and if the lord has refused this, from that time it is a clear disseysine. And on this subject sufficient will be found in the iter of the aforesaid Martin, in the county of Kent, in the twelfth year of the reign of Henry. Likewise let it be that some one has entered the tenement of a certain person under a convention, and it seems that he has done so unjustly, because he has done so without a judgment and before the truth is known f. 206. concerning the convention, and hence it seems that the plaintiff would recover by an assise, but in reality he will not recover, because although it seems at first sight that an assise ought to have place, an assise is parried by an exception of the convention, since the said person has been in possession through a convention, and with much more force, if a person has been in possession for a term and then by a convention, and has been ejected contrary to the convention. But if he be kept out by force, he has an action upon the convention, and so the exception gives birth to an exception of possessing, and an action for him who does not possess. And on that account he, who does not possess, has an action, and he who possesses, has an exception on the ground that he enters on the possession with the will of the plaintiff, because he was once willing, although he has afterwards ceased to be willing, for it is sufficient that he was once willing, nor can the mutual willingness be dissolved except by a mutual will of a contrary character. And hence in all matters it is to be seen whether the convention has been satisfied or not, and so if he who complains ought to be content or not. And if it has been agreed that he may enter, as above on the subject of donations more

conventio in assisam, & p hoc cadit assisa, & vertitur in juratam, ad inquirendum de conventione.

2. Exceptio de hoc, quod dicitur in brevi, injuste disseysivit.

Item excipi poterit contra assisam ex hac dictione, disseysivit eum, quia dici poterit quia talis nunquam fuit in seysina. Dicitur enim, qui amittit possessionem sed non ille qui nunquam in possessione fuit, nec competit assisa alicui nisi ei tantum qui tunc, cū ejiceretur, possidebat, nec alius ejici visus est, quàm is qui possidet nomine ꝑprio vel alieno. Non enim poterit disseysiri, qui nunquam seysinā habuit, nec nomine ꝑprio nec alieno. Item si nomine alieno, sicut ꝑcurator, creditor, vel firmarius, vel servus, licet naturalem habeant possessionem, ejiciantur, non eis competit assisa, sed domino ꝑprietatis qui semper habet civilem, & per tales sibi retinet naturalem. Et quia longe aliud est esse in seysina, quàm seysitus esse, sicut longe aliud est esse in possessione quâm possidere: videndum erit quis seysitus est, ad hoc q seysinam suam recuperare possit, & quis non. Et sciendum q sunt quidā in seysina & non seysiti, sicut sunt illi qui nomine possident alieno, ut supradicti, licet fuerint in possessione de voluntate dominorum, & licet quodammodo seysiti sunt quoad usum & quoad fructum, non tamen seysiti sunt quoad liberum tenementum, licet alio modo recuperare possunt possessionem suam, quam per assisam, ut inferiùs dicetur. Item sunt nonnulli, qui in seysina sunt & non seysiti ante tempus q sufficere possit pro titulo, & q pacificum sit

fully, and so the convention falls into an assise, and through this the assise falls and is converted into a jury to inquire concerning the convention.

2. An exception against his saying that he has disseysed hm.

Likewise it may be excepted against the assise on this phrase, "he has disseysed him," because it may be said, because such a person never was in seysine. For he is said [to be disseysed] who loses possession, but not he who never was in possession, nor is any one entitled to an assise except the person who, at the time when he was ejected, was in possession, nor does any one else seem to have been ejected, except the person who possesses in his own name or in another person's name. For he cannot be disseysed who never had seysine, neither in his own name nor in another person's. For he cannot be disseysed, who never had seysine, neither in his own name nor in another's. Likewise if in another person's name, as an agent, a creditor, a farmer, or a serf, although they have natural possession, if they should be ejected, they are not entitled to an assise, but the lord of the property, who has always had civil possession and through such persons retains to himself natural possession. And because it is a far different thing to be in seysine, than to have been seysed, just as it is far different to be in possession, than to possess; we must see who has been seysed, for the purpose of his being able to recover his seysine, and who not. And it is to be known that there are some in seysine and who are not seysed, such as those who possess in another person's name, as above specified, although they may have been in possession with the will of the lords, and although in a certain manner seysed as regards the use and as regards the produce, but they are not seysed as regards the freehold, although they may recover their possession in another manner than by an assise, as will be explained below. Likewise there are some who are in seysine and who are not seysed before the time which may suffice to give a title, and which should be peaceable

& longum ꝑ negligentiam, patientiam, vel impotentiam dominorum, quales sunt intrusores & disseysitores, & alii qui ratione adjuncti fuerint in seysina, ut de libero tenemento, sicut vir cum uxore, inter quos nulli liberi fuerint, si post mortem uxoris se tenuerit in seysina, vel si forte liberos habuerint sed bastardos, & perinde nullos, habuerunt quidem liberum tenementum cum uxore, sed desinunt habere statim ea deficiente. Itē sunt quidā seysiti & in seysina quoad liberum teñtum, & nō quoad feodum, sicut sunt illi qui tenent tantum ad vitā suam, sicut uxor dotē ex causa dotis. Item vir post mortem uxoris ꝑ legem Angliæ, vel ex causa donationis ad terminū vitę, vel donec sit ꝓvisū. Itē sunt quidā qui sūt ĩ seysina & seysiti, sicut
f. 206 b. sunt illi qui tenent in feodo sibi & hæredibus suis, & qui statim habēt liberū tenementum & ꝓprietatem. Item sunt quidā in seysina, licet non seysiti, sicut intrusores & disseysitores contra[1] voluntatem dñi possessionem ingrediātur, vel si cum voluntate, sicut creditor & firmarius, qui utuntur seysina aliquandò cum expletiis, aliquando sine. Et eodem modo illi, qui sunt in seysina & seysiti, quandoq; utuntur seysina cum expletiis, aliquando sine. Et licet statim non utantur[2] vel expletia ceperint, tamē statim cùm in seysina fuerint ex causa successionis vel ex justo titulo, scilicet ex causa donationis à vero dño, statim habent liberum tenementum, cum concurrant in unum & in unam ꝑsonam seysina & jus, nec multum facit ad seysinam quoad liberum tenementum usus vel captio expletiarum, quia nihil conferunt seysinæ vel tenemento, nisi quasi quoddam vestimentum ut seysinam roborant & faciant clariorem. Itē potest esse

[1] "contra." "qui contra," MS. Rawl. C. 160.

[2] "ingrediuntur," MS. Rawl. C. 160.

and long through negligence, patience, or the impotence of the lords, such as are intruders and disseysors, and others who by reason of an adjunct character are in seysine, as of a freehold, such as the husband with the wife, between whom there have been no children, if after the death of the wife he has maintained himself in possession, or if by chance they have had children, but they are bastards, and as good as none, they have had the freehold with their wife, but cease to have it when she fails. Likewise there are some who are seysed and in seysine as regards the freehold, and not as regards the fee, such as those who hold only for their life, as a wife holds her dower by reason of dower. Likewise a husband after the death of his wife by the law of England, or by reason of a donation for the term of his life or until it be provided. Likewise there are some who are in seysine and are seysed, such as those who hold in fee f. 206 b.
for themselves and their heirs, and who have forthwith the freehold and the property. Likewise there are some in seysine, who are not seysed, such as intruders and disseysors who against the will of the lord enter on possession, or with his will, such as a creditor or a farmer, who use the seysine sometimes with the profits, sometimes without. And in the same manner those who are in seysine and who are seysed sometimes use the seysine with the profits, and sometimes without them. And although they do not use it forthwith nor take the profits, nevertheless forthwith when they have been in seysine by reason of succession or upon a just title, to wit, by reason of a donation from the true lord, they have forthwith the freehold, since the seysine and the right concur together and in one person, nor do the use and the taking of the profits matter much for the seysine as regards the freehold, because they contribute nothing to the seysine or the tenement, except as a kind of clothing that they may corroborate the seysine and make it clearer. Likewise a person may

quis seysitus & in seysina & habere liberū tenementum quoad feoffatorem suum & quoad alios, qui jus habent statim post feoffamentum. Et in seysina potest esse & non seysitus quoad verum dñm, ut si quis â non dño feoffatus fuerit, & qui in possessione fuerit quacunq; de causa, nisi hoc fuerit post tempus (ut prædictū est). Et quòd quis sine usu & expletiis habere possit liberum tenementum, videri poterit p hoc, quòd nunquam in causa possessionis in aliqua assisa fit mentio de expletiis, licet aliquando de usu, sicut facit in causa ꝑprietatis, quia ad hoc quòd quis ꝑprietatem habeat, non sufficit esse in seysina, sicut ad liberum tenementum, nisi utantur cum effectu, ita quòd expletia capiat & quod sic habeat jus suum duplicatum, s. *dreit dreit.* Est enim jus possessionis & jus ꝑprietatis. Item excipere possit contra assisam, quod talis querens nunquam fuit in seysina p se, quia licet chartam de feoffamento haberet, tamen feoffator suus semper remansit in seysina, & unde iste nullam seysinam habuit p quod posset disseysiri. Item si feoffator assisam tulerit contra feoffatum, respondere poterit ad assisam, q licet feoffator aliquando seysitus esset, tamen desinit possidere p donationē, & ubi â possessione recessit omnino tam corpore quam animo. Corpore, tam ꝑprio quam alieno, quasi nullo nomine suo in possessione relicto. Item excipi poterit contra intrusores & disseysitores, si contra verum dñm petant p assisam, si post intrusionem vel disseysinam ejecti fuerint, q nullam seysinam habuerunt pacificam, quia ipse verus dñs eos recenter ejecit post intrusionem & disseysinam, ut supra de hac materia plenius. Item excipere poterit tenēs cōtra querentem in uno genere disseysinæ, ubi s. aliquis tenet & alius uti

Infra, fol. 372 b.

be seysed and in seysine and have the freehold as regards his feoffor and as regards others who have the right immediately after the feoffment. And he may be in seysine and not be seysed as regards the true lord, as if a person has been enfeoffed by a person who is not the lord, and who was in possession from some reason or other, unless this was after a certain time, as above said. And that a person may have a freehold without having the use and the profits, may be seen from this, that mention is never made of profits in a cause of possession in any assise, although sometimes of use, as is done in a cause of property, because for the purpose of showing who has the property it is not sufficient to be in seysine, as for the purpose of freehold, unless he uses it with effect, so as to take the profits and so have his right doubled, to wit, "right right." For there is a right of possession and a right of property. Likewise he may except against the assise, that such a plaintiff never was in seysine by himself, because although he had a charter of feoffment, nevertheless his feoffor remained always in seysine, and hence he had no seysine whereof he could be disseysed. Likewise if the feoffor has brought an assise against his feoffee, he may answer to the assise, that although the feoffor was at one time seysed, nevertheless he ceased to possess by an act of donation, and when he withdrew from possession both with his body and with his intention. With his body, as well his own as that of any other person, as no one was left in possession in his name. Likewise an exception can be raised against intruders and disseysors, if they claim against the true lord by an assise, if they have been ejected after their intrusion or disseysine, that they had no peaceable seysine, because the true lord himself ejected them recently after their intrusion and disseysine, as has been stated more fully above on this subject. Likewise a tenant may except against a claimant in one kind of disseysine, where, to wit, some one holds and

velit in tenemẽto suo contra voluntatem suam, ut si ille de quo queritur q uti sic velit, dicat q tenens non sic libere teneat, quia ille usus est in tenemento, & jus habet pascendi, vel aliã servitutem ex longo usu vel ex justa causa constitutionis servitutis, ad q si tenens replicaverit & dicat tenementũ suum esse liberum, & quod nullam servitutem debeat vicino, hoc p assisam in modum juratæ captam de consensu partiũ declarabitur. Item excipi poterit contra assisam & querentem, q licet aliquando esset disseysina & disseysitus, ipse nunc est in seysina libera
f. 207. & pacifica. Sed tunc refert utrũ talis ante impetrationẽ vel post. Item utrum seysinã ppriam ante impetrationem vel post sibi viribus post tempus usurpaverit, vel gratis oblatã receperit. Si autem post disseysinam & ante impetrationem, non statim & recenter seysinam sibi usurpaverit, in misericordia erit nõ solum p usurpatione & disseysina, sed etiã p falso clamore, quia post usurpationẽ nulla subfuit causa impetrandi, & tenetur nihilominus p disseysina, & eodem modo fiet si post impetrationẽ & prosecutionẽ seysinam suam gratis oblatam receperit, s. quòd ipse in misericordia pro falso clamore, si fuerit prosecutus, & alius pro disseysina. Si autem ante impetrationem hoc fecerit, tunc si postea impetraverit & uti voluerit, sit in misericordia p falso clamore, vel si se retraxerit, quia non est prosecutus.

another wishes to use something within his tenement against his will, as if he of whom he complains that he wishes to have this use, should say that the tenant does not hold so freely, because he has used something in his tenement and has the right of pasture or of some other service by long usage or from a just cause of founding the servitude, to which the tenant may reply and say that his tenement is free, and that it owes no service to his neighbour, this with the consent of the parties shall be declared by an assise held in the manner of a jury. Likewise an exception can be raised against an assise and the plaintiff, that, although there was at some time a disseysine and a party disseysed, he is now in free and peaceable seysine. But then it is of importance whether the said person was so before or after the writ was sued f. 207. out. Likewise whether he has usurped for himself by force after a time his own seysine before or after the suing out of the writ, or has received it gratuitously offered to him. If indeed after the disseysine and before the suing out of the writ he has usurped the seysine to himself not forthwith and recently, he shall be amerciable not only for the usurpation and the disseysine, but also for the false claim, because after the usurpation there was no subject cause for suing out the writ, and he is nevertheless liable for the disseysine, and it shall be done in the same way if, after writ has been sued out and prosecuted, he has received the seysine gratuitously offered him, to wit, that he shall be amerciable for the false claim, if he has prosecuted it, and another for the disseysine. But if he has done this before the suing out, then if afterwards he has sued out a writ and has wished to use it, let him be amerciable for the false claim, or if he has withdrawn himself, because he has not prosecuted.

Cap. XXVIII.

1. De hoc quod dicit de libero tenemento, et exceptio contra.

Datur etiam exceptio contra querentem[1] ex libero tenemento. Continetur enim in brevi, quòd talis injustè & sine judicio disseysivit talem de libero tenemento suo. Videndum est igitur inprimis de generibus tenementorum, & cui competat exceptio de libero tenemento, & cui non. Et sciendū quòd liberum tenementum est id, quod quis tenet sibi & hæredibus suis in feodo, & hæreditate, vel in feodo tantum, sibi & hæredibus suis. Item ut liberū tenemētum, sicut ad vitam tantum vel eodem modo ad tempus indeterminatum absq; aliqua certa temporis præfinitione, s. donec quid fiat vel non fiat; ut si dicatur, Do tali donec ei providero. Liberum autem tenementum nō potest dici alicujus, q̃d' quis tenet ad certum numerum annorum, mensium, vel dierum: licet ad terminum centum annorum, quæ excedit vitas hominū. Itē liberū non potest dici tenementū alicujus, quod quis tenet ad volūtatem dñorū precariò, q tempestivè & intempestivè poterit revocari, sicut de añ̃o in annum & de die in diem. Item dicitur liberū teñtum ad differentiā ejus q est villenagium, quia tenemētoꝝ aliud liberū, aliud villenagiū. Itē liberoꝝ aliud tenetur liberè p homagio & servitio militari, aliud in libero sokagio cū fidelitate tātū, vel cū fidelitate & homagio secundum quosdam. Item liberorum, aliud pura[2] & libera & perpetua eleëmosina, quæ quidē sunt tā in bonis hominū quàm in bonis Dei, quia dantur nō solū Deo & tali ecclesiæ, sed abbatibus & prioribus ibidem Deo servientibus. Item est teñtum datū in liberā eleemosinam rectoribus ecclesiarū, quæ pura est & libera, & magis libera & pura. Una quæ datur ecclesiæ nomine dotis in dedi-

[1] "tenenti contra querentem," MS. Rawl. C. 160.

[2] "pura," omitted, *id.*

Chapter XXVIII.

An exception is also allowed against the claimant of a freehold. For it is contained in the writ, that so-and-so unjustly and without a judgment has disseysed so and-so from his freehold. It is to be seen, therefore, in the first place, concerning the kinds of tenements, and who is entitled to an exception concerning a free tenement, and who not. And it is to be known that a free tenement is a tenement, which a person holds to himself and his heirs in fee and in inheritance, or in fee only to himself and his heirs. Likewise as a free tenement, as for life only, or in the same way for an indeterminate time without any certain prelimitation of time, to wit, until a certain thing be done or not done, as if it be said, I give to so-and-so until I shall provide for him. But the tenement of a person cannot be called free, which he possesses for a certain number of years, months, or days, although for a term of one hundred years, which exceeds the lives of men. Likewise the tenement of a person could not be called free, which he holds at the will of lords precariously, which may be reclaimed seasonably or unseasonably, as from year to year, or from day to day. Likewise a tenement is called free to distinguish it from a villenage, because of tenements one is free, another is a villenage. Likewise of free tenements, one is held freely for homage and military service, another in free sockage with fealty only, or with fealty and homage according to some. Likewise of free tenements, one is in absolute and free and perpetual alms, which indeed are amongst the goods of men as well as amongst the goods of God, which are given not only to God and such a church, but to the abbots or priors there serving God. Likewise there is a tenement given in free alms to the rectors of churches, which is absolute and free, and more free and absolute. One which is given to the church in the name of dower at the dedication, and

1. Concerning this, when he says "from a freehold," and an exception against it.

catione, & alia quæ daī post dedicationē. Itē liberorū aliud ꝑpriū, aliud cōmune. Itē cōmuniū, aliud cōmune cū particibus,[1] sicut inter plures qui sunt quasi unus hæres, & aliud cōmune quasi inter vicinos ratione vicinitatis, sicut sunt divisæ & termini agrorū, qui communes sunt, sive sunt lapides sive ligna, sive fossata, & quæ ponūt in terminis agrorū: ut sciaī quid cui debeat remanere, sicut liberū tēemētum separatim, ut sciat quilibet quid sit ꝑpriū, quid alienū. Illud autem quod proponitur ad differentiam & distinctionem
f. 207 b. agrorum, non erit proprium sed cōmune, & ita quòd totum erit unius in communi, & alterius nihil, aut separatim alicujus, & sic totum unius & nihil, sed tamen secūdùm diversos respectus. Et unde dicunt quidā, quòd si fossatum ꝑsternatur à vicino, vel in aliquo diminuatur, vel si lapides finales amoveantur, vel arbores finales succidantur, quòd ibi sit potius transgressio quàm disseysina. Revera agi poterit ad utrumq; in eo quòd disseysina continet sub se hec duo, disseysinā de libero tenemento, & transgressionem, transgressio vero non continet sub se disseysinam, sed in eo quòd disseysina sub se continet utrumq; poterit negotium terminari sicut disseysina vel sicut trāsgressio: et quia qui facit q; pl⁹ est, facit id q; min⁹ est, sed nō cōvertitur. Dñs tamē Martinus assisā cepit de divisis corruptis, vel mutatis omninò, sicut de libero tenemento, & non sicut de transgressione. Dicebat enim quòd non potest quis magis injuriosam facere disseysinam quàm de terminis demoliendis omninò, vel corrumpendis in parte, vel amovendis, sicut ꝑbatur &c. Dictum est autem de tenemento quod cōmune est cum vicinis, de eo autem quod cōmune est cum participibus dictū est supra.

[1] "participibus," MS. Rawl. C. 160.

another which is given after the dedication. Likewise of free tenements one is private property, another common. Likewise of common tenements one is common amongst the parceners, as amongst several who are as it were a single heir, and another common as it were amongst neighbours by reason of neighbourhood, such as are the divisions and boundaries of fields, which are common, whether they are stones or posts, or fosses, and which are placed in the boundaries of fields, that it may be known what ought to remain to each as a free tenement separately, that each may know what is his own, and what is another's. That also, which is set out to mark the difference and distinction of the lands, will not be private property but common, and so that the whole f. 207 b.
will be of one person in common and of another nothing, or separately of one person, and so the whole of one and nothing [of another], but nevertheless according to different respects. And hence some say, that if a foss be levelled by a neighbour, or in any respects diminished, or if boundary stones have been removed, or boundary trees cut down, that there is there rather a trespass than a disseysine. In truth proceedings may be taken on both accounts from the fact that disseysine contains within itself these two [elements], disseysine from the freehold, and trespass; but trespass does not contain within itself disseysine; but inasmuch as disseysine contains within itself both, the business may be terminated as a disseysine or as a trespass: and because he who does that which is more, does that which is less, but not the converse. But Sir Martin held an assise concerning the destroying or entire changing of divisions, as concerning freehold, and not as concerning trespass. For he used to say that a man could not cause a more injurious disseysine than by altogether demolishing boundaries, or by partially destroying or removing them, as is proved, &c. But we have spoken of a tenement which is in common with neighbours, but concerning that which is common with parceners we have spoken above.

2. De divisione tenementorum. Britton, ii. ch. xix. § 2. Fleta, 241, § 2.

Item tenementorum aliud divinum, aliud humanū. Humanum, sicut dictum est superiùs, ꝑprium, vel cōmune, & liberum & purum ut supra: secundum quod datur Deo & hominibus. Item sacrum & divinum, & liberum & purum ab omni subjectione, sicut res sacra, quę tantùm in bonis Dei est, & non in bonis alicujus privatę ꝑsonę, vel alicujus hominis singularis, s. quę ritè & ꝑ pontifices Deo sunt dedicatę & cōsecratę, nunquā ad alios usus privatos postmodū reversurę: sicut sunt monasteria, cathedralia, conventualia, parochialia, capellę dedicatę, & cęmiteria dedicata, sive mortui inferantur sive nō: q̃a si Deo semel loca illa fuerunt dedicata & consecrata, iterum ad humanos usus converti nō debent, nec ea quæ eis sunt adjuncta, & sine quibus res sacræ consistere non possunt, sicut sunt dormitoria & refectoria, coquinæ, pistoria & braceatoria, sine quibus cultores religionis ecclesiæ deservire nō possunt. Et unde unum eorum poterit esse sacrum & religiosum, & aliud magis sacrum, sicut sunt sancta ꝑ se, & sancta sanctorū magis sancta. Et unde dirutis ædificiis, adhuc semper locus permanebit sanctus, & etiam si sine cōsecratione & dedicatione mortui inferantur, adhuc erit locus sacer. Item divinorum aliud sacrum, aliud sanctum. Itē etiam sacrorū aliud nō sanctum, sed sacrū, sicut sunt muri & portæ civitatū: & ideò sacra, quia sancita ꝑ reges, & cives manētes in ea. Constituta est enim pœna capitalis in eos, qui ausu temerario muros vel portas civitatis transcendunt. Itē tenementorū quoddā nec sacrum nec sanctū, sed publicū alicujꝰ, s. universitatis, s. vel cōmunionis vel omniū, & non alicujus hominis privati, vel singularis, sicut sunt theatra & stadia, vel loca publica, sive sunt

Supra, l. i. ch. xii. § 9. Inst. ii. i. § 8, 10. Azo, p. 1062.

2. Concerning the division of tenements.

Likewise of tenements, one division is divine, another human. Human, as said above, private property or common, and free and absolute as above; according to what is given to God and to men. Likewise sacred and divine, and free and absolute from all subjection, as a sacred thing, which is only amongst the goods of God, and not in the goods of any private person or of any single man, to wit, whatever is dedicated and consecrated to God with rites and by the pontiffs, never to return afterward to any private uses, such as are monasteries, cathedrals, conventual [edifices], parochial [edifices], chapels dedicated, cemeteries dedicated, whether the dead are buried therein or not, because if those places have once been dedicated and consecrated to God, they ought not to be converted again to human uses, nor the things which are adjuncts to them, and without which the sacred things cannot consist, such as dormitories and refectories, kitchens, bakehouses, breweries, without which the members, a religious order, cannot serve their church. And hence one of those things may be sacred and religious, and another more sacred, such as are holy places of themselves, and the holy of holy places more holy. And hence if the buildings be destroyed, the place will still always remain holy, and even if the dead are buried there without the place having been dedicated or consecrated, it will still be a sacred place. Likewise of divine things, one is sacred and another holy. Likewise also of sacred things, some are not holy but sacred, such as the walls and gates of a city, and they are sacred on that account that they have been sanctioned by kings or by citizens abiding in them. For capital punishment is appointed for those, who with rash audacity overleap the walls or gates of a city. Likewise of tenements, some are neither sacred nor holy, but public, of some body, to wit, a corporation, or of a commune, or of all and not of any one private man or a single person, such as are theatres and stadia or public

in civitatibus sive extra. Non solum autem consistit liberum tenementum in terris & rebus immobilibus, verum etiam in rebus mobilibus, s. in redditibus mobilibus, sicut in aureis & argenteis, & non solum in hujusmodi, verum etiã in aliis rebus, quæ consistunt in põdere, numero, & mẽsura. Mensura, sive sit liquidum, ut vinum & oleum, sive solidum, ut frumentũ, sive mẽsuratũ sive nõ mẽsuratũ: mẽsuratum ut in modio, vel nõ mẽsuratum ut in garba, modò in uno loco,
f. 208. modò in alio, dum tamen in uno tenemento. Et eodem modo de liquido; & illud idem fiat de numero. Item liberum tenementũ dici poterit vel quasi quies & pax & pacifica possessio, & libertas, quia qui quietem non habet nec pacem, ei aufertur cõmoditas tenementi, quia sine quiete & pace tenementum teneri non potest: ut si quis p vim uti velit cõtra voluntatem domini. Item si districtiones fecerit injuriosas & transgressivas, p quas auferat domino cõmoditatem possidendi. Item si contra voluntatem domini injustè uti velit aliqua servitute, ut si velit pecora immittere per vim, vel non secundùm debitum modum, vel alia uti servitute contra voluntatem domini cujus tenementum fuerit. Item tenementorum aliud ppriũ, & alicujus per se sine participe vel sine adjuncto, aliud non per se, sed cum adjuncto & participe. Cum adjuncto, ut si vir cum uxore vel e contrariò, & qui non dicuntur participes, quia jura eorum & res divisionem non accipiunt, sunt enim una caro, quamvis animæ diversæ.

3. Item de communi tenemento. Item aliud commune cum participe ante divisionem in rebus corporalibus, quæ divisionem non recipiunt. Res vero incorporales, sicuti sunt jura, divisionem non

places, whether they are in cities or outside of them. But not only does a freehold consist of lands and immovables but also of movables, to wit, of movable rents, such as of golden or silver objects, and not only in objects of this kind, but in other things which consist of weight, number, and measure. In measure, as if it be liquid, as wine and oil, or solid as corn, whether measured or not measured, measured as in a bushel, or not measured as in a sheaf, sometimes in one place, sometimes in another, provided they are always in one tenement. And in the same manner concerning liquid, and f. 208.
the same thing may be done with number. Likewise a freehold as it were may be said to be there where there is quiet and peace and a peaceable possession and liberty, because he who has not quiet and peace, from him is taken away the convenience of the tenement, because a tenement cannot be held without quiet and peace, as if any one should wish to use it through violence contrary to the will of the lord. Likewise, if he has made injurious and transgressive distraints, by which he takes away from the lord the convenience of his possession. Likewise, if contrary to the will of the lord he wishes unjustly to use some easement, as if he wishes to turn in his sheep by force or not according to the due manner, or to use some other easement against the will of the lord whose tenement it is. Likewise of tenements, some are private property and belong to some one person by himself without a parcener or without an associate, others not by himself, but with an associate and parcener. With an associate, as a man with his wife or the converse, and who are not called parceners, because their rights and property do not admit of division, for they are one flesh although different souls.

3. Likewise concerning a common tenement.

Likewise another kind are common with a coparcener before a division in the case of things, which do not admit of division. But incorporeal things, such as rights, do not admit of division, nevertheless they are common.

recipiunt, tamẽ sunt cōmunia. Eodem modo libertates communes sunt, quæ divisiones nō recipiunt. Propriè autem dicitur commune una cum aliis, vel cum aliis una i. simul, & tale tenementum commune non est ꝑprium ꝑ se alicujus, nec discretum, sed cum aliis per totum in communi. Item quod corporale est & de natura sua divisible inter cohæredes & participes, de communi consensu eorum remanere poterit indivisum sibi & aliis ad aliquem usum, sicut ad usum pascendi vel fodiendi, & erit usus cujuslibet singularis & per se per totum, & tenementum commune omnibus participibus & per totum, & non singulare alicujus per totum, sed in parte. Et unde quod de communi consensu semel inter partes cōtrahitur, quòd tenementum remaneat in communi, sine contrario consensu omninò dissolvi vel dividi non potest: quia nihil adeo conveniens est naturali æquitati &c. Item commune cum aliis, & non per se sine aliis, & quod divisionem non recipit nec de consensu partium nec sine, sicut sunt jura, de quibus supra mentionem fecimus : secundùm quod videri poterit in jure præsentandi, quod indivisibile est, licet commune. Et unde aut omnes consentient aut præsentẽt[1] aut nullus, quia nō valebit præsentatio, si unus ex pluribus cōtradicat, nec præfertur pluralitas sive majoritas, nec æsnetia. Item tenementum poterit esse commune inter plures & non participes quantùm ad aliquẽ usum, nec erit alicujus ꝑprium per se nec certis personis commune, sed alicujus universitatis, sive in civitate sive extra, sicut stadium & theatrum & hujusmodi. Item est quasi tenementum quod majus est commune,[2] s. quod nō est alicujus singularis per-

[1] "est præsentent," Rawl. MS. C. 160. | [2] "majus communi est," *id.*

In the same manner franchises are common, which do not admit of division. But a thing is properly called common which [is held] in union with others, or with others in union, to wit, together, and such a common tenement is not the property of any one by himself, nor distinctly, but it is held with others throughout in common. Likewise what is corporeal and of its nature divisible between coheirs and coparceners, with their common consent may remain undivided for themselves and others for some particular use, as for the use of pasture or digging, and the use will be for each person in singular and by himself throughout, and the tenement will be common to all the coparceners and throughout, and not distinct to any individual throughout, but in part. And hence, whatever contract has been entered into between the parties with their common consent, that the tenement shall remain in common, it cannot be dissolved or divided without a contrary consent, because nothing is so agreeable to natural equity, &c. Likewise a thing is common with other persons, and not personal without others, and which does not admit of division, neither with the consent of parties nor without, such as rights, concerning which we have made mention above, according to what may be seen in the right of presentation, which is indivisible, although it is common. And hence either all must consent to present or none, because the presentation will not be valid, if one out of several opposes, nor is plurality or the majority preferred, nor the right of primogeniture. Likewise a tenement may be common between several, who are not coparceners as respects some use, nor will it be the private property of any one person, nor will it be common to certain persons, but of some corporation, whether in a city or outside of it, as a race ground and a theatre and such like. Likewise there is a kind of tenement which is more common, to wit, which does not belong to any single

sonæ per se, nec in communi, nec alicujus universitatis per se, sed commune omnium, sicut est via regia, littus maris, ut supra, de rerum divisione pleniùs. Illa vero quæ in bonis Dei sunt, & de quibus superiùs dictum est, nullius hominis sunt, nec possideri possunt ab homine aut vendi, nec ad alium transferri possint, ut fieri possit liberum tenementum alicujus, nec recuperari ut liberum tenementum.

Supra, Lib. i. ch. xii. § 5.

4. Item de pastura. f. 208 b. Britton, l. ii. ch. xi. § 15. Fleta, 215.

Item dici poterit liberum tenementum alicujus per se vel in communi piscaria in fundo ꝑprio: ut si quis terrā possideat propè ripam ex utraq; parte aquæ, ꝑ totū licebit ei piscari sicut in libero teñto suo sine impedimento alicujus, & si quis eum impediverit, facit ei disseysinā, nec cōpetit ei hoc facere in proprio ex aliqua impositione servitutis, cùm nemini serviet fundus ꝑprius. Item si tātum ex altera parte prædia possideat ꝑpe ripam, teñtum suum erit usq; ad filum aquæ, & sua erit piscaria & jus piscandi sine alio, nisi forte ita sit quòd servitutē imponat fundo suo, quòd quis possit piscari cū eo, & ita in cōmuni, vel q alius ꝑ se ex toto: & q quis sibi ipsi servitutem imposuerit, quòd ipse non possit. In communi autē piscari poterit vicinus cum vicino ex vicinitate vel ꝑ certo precio vel ex longo usu usq; ad similitudinē juris pascendi in alieno. Itē quid dicetur de muliere, quæ piscari debeat nomine dotis, videndū erit utrū assignetur ei aliqua piscaria ꝑ se nomine dotis, hoc erit suum liberum teñtum. Si autem piscari debeat in communi cum waranto suo ra-

person by himself, nor in common, nor to any corporate body by itself, but is common to all mankind, such as the king's highway, the shore of the sea, as above has been treated of more fully, concerning the division of things. But those things which are amongst the goods of God, and concerning which we have spoken above, belong to no man, nor can they be possessed or sold by any man, nor can they be transferred to another so as to become the freehold of any one, nor be recovered as a freehold.

4. Likewise concerning pasture. f. 208 b.

Likewise a fishery in his own ground may be said to be the freehold of a person either by himself or in common, as if a person possesses the land on both sides of a river close to its banks, it will be allowable for him to fish over the whole as in his free tenement without impediment from any one, and if anybody impedes him, he causes him a disseysine, nor is he entitled to do this in his own property upon some claim of an easement, as no property will be subject to an easement to the proprietor. Likewise if he possesses the lands only on one side close to the edge, his tenement will extend to the mid-channel of the water, and it will be his fishery, and he will have the right of fishing without any other person, unless perchance it should happen that he imposes an easement on his own land, that a person may fish with him, and so in common, or that another may fish by himself over the entirety, and that a person should impose upon himself the servitude, that he should not be able. But a neighbour may fish in common with a neighbour from neighbourhood, or for a certain price, or from long use, after the likeness of a right of pasture in another's land. Likewise what shall be said of a woman, who ought to fish in the name of her dower? We must see whether a certain fishery has been assigned to her by itself in the name of dower, this will be her free tenement. But if she ought to fish in common with her warrantor by

tione suæ tertiæ partis, erit piscaria sua liberū teñtum, s. in cōmuni cum waranto suo. Si autem concedatur ei tertia piscatio ꝑ se, tempore piscationis suæ erit liberū teñtum suum, quamdiu piscata fuerit, & desinit esse cùm piscari desierit, & sic incipit & desinit. Si autē cōcedatur ei tertius piscis, nullum habebit liberū teñtū in piscaria. Habebit enim in numero piscium, quasi de certo redditu, sicut in denariis. Et si nullam habeat in hoc casu districtionem, locum habebit assisa novæ disseysinæ, quia deficit districtio. Itē potest quis liberū teñtū habere, eo quòd in possessione est, dū tamē nomine proprio, licet ꝑ intrusionē vel dissey sinā, versus omnes qui jus non habent, sed versus dñm ꝓprietatis non, nisi hoc habeat ex tempore q̄ sufficere possit pro titulo cum longa, continua, & pacifica seysina. Itē potest quis firmam habere seysinam versus quosdā sicut non dominos ex tempore, & teneram & infirmā erga veros dños, & sic liberū tenementum versus quosdā, & nō versus alios. Itē servus in statu libero versus omnes dños & non dños, & sub potestate dominorū existens erga nō dominos, sed erga dominos non nisi in casu.

5. Item aliud villenagium, quod sic dividitur. Britton, l. iii. ch. ii. § 12.

Item tenementorū aliud villenagium, & villenagiorum aliud purum, aliud privilegiatum. Purum autem villēnagiū est, q̄ sic tenetur, q̄ ille qui tenet in villenagio sive liber sive servus, faciet de villenagio quicquid ei præceptum fuerit, nec scire debeat serò quid facere debeat in crastino, & semper tenebitur ad incerta. Talliari autē potest ad volūtatē dñi ad plus vel ad minus. Itē dare merchetū ad filiā maritandā, & ita

reason of her third part, her fishery will be a free tenement, to wit, in common with her warrantor. But if there be granted to her a fishery by itself as her thirds, during the time of her fishery it will be her free tenement, as long as she fishes, and it ceases to be so when she ceases to fish, and so it begins and ends. But if there be granted to her every third fish, she will have no freehold in the fishery. For she will have in the number of the fish a certain rent, just as in money. And if she have no right of distraint in this case, an assise of novel disseysine will have place, because a distraint fails. Likewise a person may have a free tenement, inasmuch as he is in possession, provided it is in his own name, although by intrusion or by disseysine, against all who have no right, but against the lord of the property not so, unless he should have this for a time which may suffice for a title, with long and continuous and peaceable possession. Likewise a person may have a firm seysine against certain persons, as against persons who are not the lords, from time, and a tender and weak seysine against the true lords, and so a freehold against some, and not against others. Likewise a serf in a free *status* [is free] against all, whether they are his lords or not, and if he is within the power of his lords against those who are not his lords, but not against his lords except in a [special] case.

5. Likewise another villenage, which is thus divided.

Likewise of tenements another is a villenage, and of villenages one is absolute, another is privileged. But an absolute villenage is that which is so held, that he who holds it in villenage, whether he be a free person or a serf, shall do of villenage whatever he is ordered to do, nor ought he to know at night what he is to do on the morrow, and he will be always liable to uncertain duties. But he may be talliaged at the will of the lord more or less. Likewise to give blood-money (for permission) to give away his daughter in marriage, and thus he will be

semper tenebitur ad incerta, ita tamē q si liber homo sit, hoc faciat nomine villenagii & non nomine personæ, nec etiam tenebitur ad merchetum de jure, quia hoc non ptinet ad psonā liberi, sed villani. Si autē villanus fuerit, omnia faciat & incerta tam ratione villenagii quàm psonæ, nec liber homo, si sic tenuerit, cōtra volūtatē domini villenagiū retinere poterit, nec ipse cōpelli q retineat nisi velit. Est etiā villenagiū nō ita purū, sive cōcedatur libero homini vel villano ex conventione tenendū p certis servitiis & cōsuetudinibus nominatis & expressis, quāvis servicia & cōsuetudines sunt villanæ. Et unde si liber ejectus fuerit vel villan^{9} manumissus vel alienat^{9}, recuperare nō poterūt ut liberū teñtū, cùm sit villenagiū & cadit assisa,
f. 209. vertiť tamē in juratā ad inquirendum de conventione, ꝑpter voluntatem dimittentis et consensum, quia si querētes in tali casu recuperaverint villenagium, nō erit propter hoc dño injuriatū propter ipsius voluntatem et consensum, et contra voluntatem suam jura ei nō subveniūt, quia si dñs potest villanum manumittere et feoffare, multo fortius poterit ei quandā convētionē facere, et quia si potest id quod plus est, potest multò fortiùs id quod minus est. Est etiam aliud genus villenagii q tenetur de dño rege à cōquestu Angliæ, quod dicitur socagium villanum, et quod est villenagium, sed tamen privilegiatum. Habent itaq, tenentes de dominicis dñi regis tale privilegium, quòd à gleba amoveri non debent, quādiu velint et possint facere debitū servitium, et hujusmodi villani sokmanni, propriè dicuntur glebæ ascriptitii. Villana autem faciunt servitia, sed certa et determinata. Nec compelli poterunt contra voluntatem suā

Britton, l. iii. ch. ii. § 11. Fleta, 4.

always liable for uncertainties, in such manner however that if he be a free person he does this in the name of the villenage, and not in the name of his person, nor will he be bound to pay blood money of right, because this does not appertain to the person of a free man, but of a villein. But if he be a villein, he must do every thing however uncertain as well by reason of the villenage as of his person, and a free person, if he holds in such condition, cannot retain the villenage against the will of the lord, nor can he be compelled to retain it unless he is willing. There is likewise a villenage which is not so absolute, whether it be conceded to a free man or to a villein, to be held upon an agreement for certain services and customs named and expressed, although the services and customs are villein. And whence if a free man or a villein who has been manumitted or alienated has been ejected, he cannot recover it as a free tenement, since it is a villenage, and an assise fails, it is turned however into a jury to inquire concerning the agreement, on account of f. 209.
the willingness and consent of the party who dismisses the other, because if plaintiffs in such a case recover the villenage, no injury on that account will accrue to the lord on account of his willingness and consent, and right does not aid him against his will, because if a lord may manumit and enfeoff a villein, much more may he make a certain agreement with him, and if he can do that which is more, with much more reason may he do that which is less. There is another kind of villenage which is held of the lord the king since the conquest of England, which is called villein sockage, and which is villenage, but privileged. The tenants for instance of demesnes of the lord the king have such a privilege that they cannot be removed from the soil, as long as they are willing and can do the required service, and this kind of villein sockmen are properly called ascribed to the soil. But they do villein services, but certain and determined. Nor can they be compelled against their will to hold this

ad tenēda hujusmodi teñta: et ideo dicūtur liberi. Dare autē nō possunt teñta sua, nec ex causa donationis ad alios trāsferre, nō magis quàm villani puri, et unde si transferri debeant, restituunt ea dño vel ballivo, & ipsi ea tradunt aliis in villenagiū tenenda. Itē est maneriū dñi regis & dominicū in manerio, & sic plura genera hominū in manerio, vel quia ab initio, vel quia mutato villenagio. Sunt enim in manerio dñi regis milites & liberè tenentes p servitium militare, & in libero sokagio. Sunt autem adventitii, qui eodem modo tenent, p cōventionē sicut & villani sokmanni, sed tales nō habēt privilegiū, sicut alii villani sokmāni, nisi tātū convētionē. Et unde si tales cùm aliis querāt, non dabitur eis privilegiū, sed tantùm sua cōventio. Notandū etiā inter cætera, q potest quis habere in libero tenemēto jus, & pprietatē, & feodum, & alius liberū teñtū. Itē unus feodum & liberū tenemētū, & alius jus merum. Item unus hæc omnia, & alius usum fructum. Item unus hæc omnia, & usum, & alius fructum, & ex fructu sive redditu liberum tenementum, & sic duo (ut videtur) in una & eadem re redditum & liberum tenementum. Sed revera non in eadem re, quia tenementum est corpus, de quo pvenit redditus, & sic res una p se. Redditus autem, quí de tenemēto pvenit, una res est p se & unum corpus. Item de hoc q dicit, q unus habet hæc omnia prædicta & etiam usum, & alius fructum, videri poterit, ut si quis de teñto suo quod habet in dñico & excoluerit, dederit alicui aliquam certā partē fructuū, s. tertiā garbā vel quartā garbā modò in uno cāpo, modò in alio,

kind of tenement, and therefore they are called free. But they cannot give away their tenements, nor transfer them to others in the way of donation, no more than absolute villeins, and hence if they ought to be transferred, they restore them to the lord or his bailiff, and they deliver them to others to be held in villenage. Likewise there is a manor of the lord the king and a demesne in the manor, and thus there are many kinds of men in the manor, either because so from the beginning, or because so upon the villenage having been changed. For there are in a manor of the lord the king knights and freeholders by military service, and in free sockage. There are also adventitious tenants, who hold in the same manner by agreement as the villein sockmen, but such persons have not a privilege, like other villein sockmen except only by an agreement. And hence if such persons with others are plaintiffs, a privilege is not allowed them, but only their agreement. It is to be noted also amongst other things, that a person may have in a free tenement the right and the property and the fee, and another the freehold. Likewise one the fee and the freehold, and another the absolute right. Likewise one may have all of these and another the usufruct. Likewise one may have all of these and the use, and another the produce, and of the profits or the rents a free tenement, and so two as it seems may have in one and the same thing the rent and the free tenement. But in truth not in the same thing, because the tenement is the body from which the rent is derived, and so is one thing by itself. But the rent, which is derived from the tenement, is one thing by itself and one body. Likewise concerning this which is said, that one person has all these things aforesaid and even the use, and another the produce, it can be seen, as if a person from his tenement, which he has in demesne and has cultivated, should give to some one some certain part of the produce, to wit, every third sheaf or every fourth sheaf, at one time in one field, at another time in

licet campi incerti sint quo añ excoli debeāt, tamē q talis ꝑcipere debeat, cùm campi culti sint, habet liberū teñtū, & ille qui solvit eodē modo. Unus, s. in teñto, & alius in redditu.

6. De exceptionibus de hoc, quod dicit de libero tenemento.

Ex hoc q̃d cōtinetur in brevi, s. de libero teñto, datur exceptio tenēti cōtra assisā & cōtra querentem multis modis. Dicere enim poterit cōtra querētē, q querēs nūquā fuit in seysina de teñto illo sicut de libero teñto suo, quāvis quodam̄odò in seysina. De hoc autē q dicit̃ suo, videt̃ ꝑ hoc innuere, q si querens aliquādo fuit in seysina, in seysina fuit nomine alieno & nō ꝑprio. Unde cùm querens fundavit intentionē suā & docuit tenementum esse suum, tenens, si possit, doceat, illud tēpore disseysinæ fuisse alienū, q multis modis facere poterit, sicut ex ꝑcedētibus videri poterit manifestè. In hoc autē q̃d dicitur in brevi, de
f. 209 b. libero tenemento, competit exceptio tenenti contra querentem, sed ad omnes non ꝑtinet exceptio, quia licet justè ejicere possunt, tamen non possunt sine judicio, licet jus habeant ejiciendi. Jus tamen habet recenter, post tempus autem nequaquam, unde si verus dñs allegaverit quòd justè, replicari poterit quòd injustè, quia sine judicio. Et unde si verus dominus excipiat quòd jus habeat et liberum tenementum, et injustè et sine judicio ejectus sit, et quòd querēs, qui injustè ejecit, feodum et liberum tenementum habere non possit, replicare poterit de tempore, quòd verus dominus liberum tenementum amisit per cursum temporis, per patientiā sive negligentiam vel ꝑ impotentiā.

7. Quod patientia per

Patientia enim longa trahitur ad consensum, et negligentia sive dissimulatio obolent[1] injuriam. Et unde

[1] "abolent," MS. Rawl. C. 160.

another field, although the fields are uncertain in what year they ought to be in crop, nevertheless since the said person is entitled to receive [his sheaf] whenever the fields are under cultivation, he has a free tenement, and he who pays him, in the same manner. One, to wit, in the tenement, the other in the rentcharge.

6. Concerning exceptions on the words of the writ "from his free tenement."

Upon this which is contained in the writ, to wit, "from "his free tenement," an exception is allowed to the tenant against the assise and against the claimant in many ways. For he may say against the claimant, that the claimant never was in seysine of that tenement as his free tenement, although in some way or other in seysine. But upon this that it is said "from his" he appears to intimate by these words, that if the claimant ever was in seysine, he was in seysine in the name of another person and not in his own name. Hence when the plaintiff has founded his statement and declared the tenement to be his own, let the tenant, if he can, show that it was another person's tenement at the time of the disseyine, which he may do in various ways, as may be seen manifestly from what has preceded. But upon this which is said in the writ "from a free tenement," the tenant f. 209 b. is entitled to an exception against the claimant, but the exception does not appertain to all persons, because although they may justly eject, yet they cannot do so without a judgment, although they have the right of ejecting. For he has the right recently, but after a time by no means, whence if the true lord shall except that he has the right and the freehold and has been ejected unjustly and without a judgment, and that the claimant who has unjustly ejected him cannot have the fee and free tenement, he may reply upon the time, that the true lord has lost the freehold through efflux of time, by sufferance or negligence or by powerlessness.

7. That sufferance

For long sufferance is treated as consent, and negligence or dissimulation wipe away an injury. And hence

longum tempus habita trahitur ad consensum.

disseysitor cùm tempus habeat pro se et quasi liberum tenementum, sine brevi et sine judicio disseysiri non potest. Et unde si fuerit sine judicio disseysitus et portaverit assisam, non obstabit ei exceptio quòd liberum tenementum non habuit querens, ꝑpter usurpationem sine judicio, quantum ad verum dominum, et ꝑpter tempus quantum ad disseysitum. Et in quo casu, si alius à vero domino post tempus ejecerit, statim post disseysinam vel intrusionem contra ejectum habet exceptionem, quòd tenens liberum tenementum non habuit, exceptionem de libero tenemento non habebit, & ideo statim, quia jus non habuit, quod esse posset si jus haberet, nec etiam obstabit intrusori vel disseysitori exceptio teneræ seysinæ cōtra intrusorem vel disseysitorem, quia nihil ad eos de tenera seysina vel alia, cùm nihil ad eos ꝑtineat quòd ejiciant intrusorem vel disseysitorem ꝑpter seysinā qualem præhabitā, justā vel injustam, cù ad disseysitorem nō ꝑtineat utrum justa sit vel injusta. Et unde cùm tenens disseysitor nihil juris habuerit vel intrusor, & ille qui nihil juris habuerit eum disseysiverit, si disseysitus restitutionem ꝑ assisam quæsiverit, non obstabit ei exceptio liberi tenementi duabus rationibus, tum propter commodum possidendi, tum quia licet possessor & disseysitor in re possessa jus non habuerit, nec justam seysinā, ille qui fuit extra possessionem & jus non habuit petendi nec aliquam actionem sine judicio ejecit, cùm ꝑ actionem nō potuit, ꝑ judiciū amittat & ꝑ assisam, non obstante aliqua exceptione ꝑprietatis vel teneræ seysinæ, quia si ego possideā injuste ꝑ intrusionē vel disseysinam, non facio ꝑ hoc injuriam ei qui jus nō habet. Et unde si ille qui jus nō habet petat à me in judicio petitorio

a disseysor when he has time in his favour, and as it were a freehold, cannot be disseysed without a writ and without a judgment. And hence if he be disseysed without a judgment and has brought an assise, the exception shall not be in his way that the plaintiff had not a freehold, on account of his usurpation without a judgment as regards the true lord, and on account of the time as regards the person disseysed. And in which case, if another than the true lord has ejected him after some time, forthwith after the disseysine or intrusion he has an exception against the person ejected, that the tenant had not the freehold, he shall not have an exception concerning the freehold, and therefore forthwith, because he had not any right, which might be if he had the right, nor will the exception of a tender seysine against an intruder or disseysor be an obstacle to the intruder or disseysor, because it does not concern them at all concerning a tender or other kind of seysine, because it does not appertain to them that they should eject the intruder or disseysor on account of any prior seysine, just or unjust, since it does not appertain to the disseysor whether it be just or unjust. And hence since the tenant disseysor or intruder has no right, and he, who has no right, has disseysed him, if the person disseysed has sought restitution by an assise, the exception of a freehold shall not be an obstacle to him for two reasons, as well on account of the advantage of possession, as because, although the possessor or disseysor has no right in the thing possessed, nor a rightful seysine, he, who was out of possession and had no right of claiming nor any right of action, has ejected him without a judgment, when he could not by an action, he shall lose it by a judgment and an assise, notwithstanding any exception of property or tender seysine, because if I possess unjustly by intrusion or disseysine, I do not cause an injury to him who has no right. And hence if he who has no right claims from me in a petitory action who have no right, it is not sufficient

continued over a long time is treated as consent.

qui jus nō habeo, nō sufficit si doceat me nihil juris habere, nisi doceat q ipse jus habeat p q sibi competere debeat actio. Et unde si nec jus habeat nec actionē, quamvis ego jus non habeam, cadet assisa, & remanebit suo loco possessio. Et unde non habeat actionem, si me p vim sine judicio ejecerit, si statim ipsum rejecero, non recuperabit, quia non habet liberum tenementum ꝑpter temporis brevitatē & ꝑpter teneram seysinā. Et si mihi p assisam novæ disseysinæ ꝑquisivero statim vel post tempus, excipiat cōtra me q liberum tenemētum non habuero in re, quam ab alio injustè possideo, nō competit ei ista exceptio, sed ei forte quem ejeci injustè & sine judicio. Et cùm alienum sit liberum tenementum, nō acquiritur que-
f. 210. rēti exceptio de alieno jure, cùm injuriosa sit ejus possessio. Et unde merito cùm extra possessionē positus jus nō habeat nec actionē, si sibi seysinā injustè & sine judicio usurpaverit, exceptionē nō habebit, nec debet esse melioris cōditionis quàm verus dñs, qui cùm injustè & sine judicio ejectus fuerit, post lōgū intervallū vel post impetrationē, seysinā suā sine judicio sibi usurpaverit quāvis justè, injustè tamē, quia sine judicio. Et unde si disseysitor petat versus verū dñm p assisā, & dñs excipiat contra disseysitorē q liberū tenemētum nō habuit, nō obstabit ei exceptio, quin recuperat p assisam. Item ad primū casum de intrusore & disseysitore petentibus restitutionē p assisam cōtra suū disseysitorē, omnis qui in possessione fuerit, licet jus non habeat, majus jus habet eo, q est extra possessionē, & ideò jus nō habet. Unde si majus jus habeat, sequit q jus habet, & majus eo, qui jus non

for him to show that I have no right, unless he shows that he has a right whereby he is entitled to an action. And hence if he has neither the right nor a right of action, although I have not the right, the assise will fail, and the possession will remain in its place. And hence he would not have a right of action, if he should eject me by force without a judgment, if I should immediately reject him, he will not recover, because he has not a freehold on account of the shortness of the time and on account of his tender seysine. And if I shall sue for the thing by an assise of novel disseysine forthwith or after a time, he may except against me that I have not a freehold in the thing, which I possess unjustly from another, that exception is not allowable to him, but to that person perhaps whom I have ejected unjustly and without a judgment. And since the freehold is another's, the claimant does not acquire an exception concerning another's right, since his possession is unrightful. And hence deservedly, since being placed out of possession he has no right nor action, if he has usurped to himself seysine unrightfully and without a judgment, he shall not have an exception, nor ought he to be in a better condition than the true lord, who, when he has been ejected unjustly and without a judgment, after a long interval or after suing out a writ, has usurped to himself his seysine without a judgment although justly, unrightfully however, because without a judgment. And hence if the disseysor claims against the true lord by an assise, and the lord excepts against the disseysor that he had not the freehold, the exception will be no obstacle to him, to prevent his recovering the thing by an assise. Likewise upon the first case of an intruder and disseysor seeking restitution by an assise against their own disseysor, every one who is in possession, although he has not the right, has more right than he who is out of possession and therefore has no right. Hence if he has more right, it follows that he has some right, and more right than f. 210.

habet, ꝑpter possessionem. Et unde videtur, ꝙ habeat quasi liberum tenementum contra eum qui jus non habet. Si autem disseysitor secundus ꝑpter negligentiā primi disseysitoris quasi liberū tenemētū (ut prædictum est) habere inceperit, si sine judicio ejectus fuerit, sive à vero dño sive à primo disseysitore, seysinam recuperabit, non obstāte exceptione de libero tenemēto. Et unde videt̃ ex præmissis, ꝙ licet competat exceptio cōtra querētē aliquādo de libero tenemēto, nō tamē cōpetit cuilibet de populo ut illā opponat, non magis quàm exceptio bastardiæ vel servitutis in suis casibus, ut superiùs dictū est. Item etsi aliquādò cōpetat ei replicatio cōtra exceptionē, tamē nō cōpetit cuilibet, ut illā opponat, sicut videri poterit: si vir aliquē feoffaverit de hæreditate uxoris, & viro præmortuo, si uxor petat ꝑ breve de ingressu, & excipiatur cōtra ipsam de dono suo simul cū viro, replicare poterit ꝙ viro suo cōtradicere non potuit, & sic recuperabit. Si autem mortua muliere extra seysinā, sit hæres qui petat ꝑ consimile breve de ingressu, non habebit locū in ꝑsona sua ꝑpter replicationē, quæ ad ipsum nō ꝑtinet & quæ cōpetit matri, ut si petat & excipiatur de dono, ipse replicare non potest sicut posset mater si viveret, quia ꝑ hoc ꝙ dicitur in brevi, & cui mater mea contradicere non potuit, videtur ꝑ hoc quòd matri competiit talis replicatio & nō hæredi, ut infra videri poterit in tractatu de ingressibus.

he who has no right, on account of the possession. And hence it seems, that he has a kind of freehold against him, who has no right. But if a second disseysor on account of the negligence of the first disseysor begins to have as it were a freehold (as aforesaid), if he be ejected without a judgment, whether by the true lord or by the first disseysor, he shall recover seysine, notwithstanding an exception concerning the freehold. And hence it seems from the premises, that although an exception is admissible against a claimant sometimes on the ground of freehold, it is not however allowable to any person whatsoever to raise it, no more than an exception of bastardy or of serfdom in their own cases, as said above. Likewise although a replication to the exception is admissible sometimes, yet it is not allowable to every person to raise it, as may be seen: if a husband has enfeoffed any one with the inheritance of his wife, and the husband having predeceased her, if the wife claims by a writ of entry, and an exception be raised against her upon the ground of her gift together with her husband, she may reply that she could not gainsay her husband, and so she shall recover. But if the woman having died when out of seysine, there be an heir who claims by a similar writ of entry, he shall not have a place in his own person on account of the replication, which does not pertain to him, and which was allowable to his mother, as if he should claim and an exception be raised on account of the gift, he cannot reply, as his mother could, if she were alive, because of the phrase which is used in the writ, "and which my mother could not gainsay," it seems from this phrase that such a reply was allowable to the mother, and not to the heir, as may be seen below in the treatise on entries.

Cap. XXIX.

1. Si disseysitus post longum intervallum autoritate propria seysinam suam sine judicio sibi usurpaverit.

Videamus quæ pœna teneat eos, qui seysinam suam in causa spoliationis sine judicio post tempus sibi viribus usurpaverit,[1] intrusor verò vel disseysitor erit restituendus, non obstāte aliqua exceptione ꝑprietatis. Et si obstare nō debeat exceptio ꝑprietatis in ꝑsona veri dñi, ut si dicat justè disseysivi vos, quia tenemētū meū est & ego dñs, & tu nullū liberū tenemētū habere potes, quia non habes ingressionem nisi ꝑ intrusionem vel disseysinā, ista exceptio nō valebit ei, quāvis justè se ponat in seysinā quantum ad jus, injustè tamen hoc facit, quia sine judicio, ut supra dictum est priùs enim cognoscēdū est de vi quā de ipsa ꝑprietate. Eodē modo si servit[9] objiciaṫ, priùs
f. 210 b. cognoscēdum est de vi, quam de cōditione, ut si ille objiciat servitutem qui nihil juris habet in corpore, ut supra plenius de exceptione servitutis. Ad hoc autem facit ratio, ut si scripto hæredi objiciatur quòd testamentum falsum sit vel inofficiosum, vel q̄ testator servus fuerit, nihilominus scriptus hæres mitti debet in possessionem, nec refert utrum jus habet in re vel nō quoad restitutionem, dummodo cōtra juris ordinem fuit spoliatus, vel sine judicio & alibi. Si ad verum dominum violenter possessio pervenerit, i. ꝑ vim & sine judicio, & ubi conqueri deberet, facit se judicem & ejicit disseysitorem, malæ fidei possessor, i. disseysitor indistincte, i. non obstante aliqua exceptione à vero dño opposita, possessionis commodum reportabit. Et alibi, quòd dñs, qui dejecit vel spoliavit, cogitur

[1] "usurpaverint," MS. Rawl. C. 160.

Chapter XXIX.

Let us see what penalty binds those, who have usurped by force to themselves after some time without a judgment their own seysine in a cause of spoliation, the intruder however or disseysor will have to be restored, notwithstanding any exception of property. And if an exception of property in the person of the true lord ought not to be in the way, as if he should say, "I have "justly disseysed you, because the tenement is mine and "I am the lord," and you can have no freehold, for you have no ingress except by intrusion and disseysine, that exception will not avail him, although he puts himself justly into seysine as far as the right is concerned, but he does it unrightfully, because he does it without a judgment, as aforesaid, for cognisance ought to be had of the violence before the property. In the same way if serfdom is objected, cognisance must be had of the violence before the condition, as if he, who has no right over the person, should raise the objection of serfdom, as has been said above more fully on the exception of serfdom. Reason also accords with this, as if it be objected to an heir under a writing that the testament is false or undutiful, or that the testator was a serf, nevertheless the heir under the writing ought to be put into possession, nor does it matter whether he has the right in the thing or not as regards the restitution of it, provided he has been despoiled contrary to the order of right, or without a judgment and otherwise. If the possession has come into the hands of the true lord by violence, through force and without a judgment, and when he ought to complain, he makes himself a judge and ejects the disseysor, the possessor in bad faith, that is the disseysor, indiscriminately, that is notwithstanding an exception has been raised by the true lord, will reap the benefit of the possession. And otherwise, seeing that the lord who has deprived or ejected him, is compelled to

1. If a person disseysed after a long interval of his own authority has usurped to himself his seysine without a judgment.

f. 210 b.

restituere possessionem ei quem ejecit, licet dominus ab eo, qui dejecit[1] vi, clam vel precario possiderit.[2] Item alibi, quòd ille qui à me vi possidebat, i. p disseysinam, ab alio qui jus non habuerit fuerit spoliatus, habebit restitutionem p assisam. Pœna autem erit spoliatoris, ut si sua sit res cujus seysinam sibi sine judicio usurpavit, quòd illam spoliator restituat cum fructibus receptis & percipiendis: vix tamen super proprietatem imposterum audiendus. Si autem aliena, illam eodem modo restituat, nunquam postmodum nec super possessione nec super proprietatē audiendus.

Cap. XXX.

1. De transgressionibus, et ubi assisa cadit in transgressionem per juratam terminatam et non in modum assisæ. Britton, ii. ch. xx. Fleta, 233.

Competit multotiens exceptio tenenti contra querentem ratione tenementi, ut si ille, qui queritur, liberum tenementum habere non poterit, sed alius, ut si custos vel firmarius, creditor, vel servus, querantur, & petant restitutionem p assisam, non competit eis assisa, sed domino proprietatis cujus nomine fuerint in possessione, quia actionem illorum elidit exceptio liberi tenementi. Item competit exceptio tenenti ratione tenementi & rei, quæ sacra est & sancta, sicut sunt loca Deo dedicata, & quæ ab aliquo possideri nō possunt, & ideò nulli competit assisa, & in quo casu cadit assisa, & non breve, et vertitur assisa in juratam ad inquirendum de transgressione, si facta fuerit in re sacra, quia ibi nulla disseysina, ut per juratam emendetur transgressio, & uterq; tam querens quàm transgressor in misericordia, s. querens pro falso clamore, & trans-

[1] "quem dejecit," MS. Rawl. C. 160.

[2] "possideret," *id.*

restore the possession to him, whom he has ejected, although the lord has possessed it surreptitiously or precariously from him, who has ejected him by violence. Likewise otherwise seeing that he who has possessed it from me by violence, that is by disseysine, if he was despoiled by another, who had no right, shall have restitution by an assise. But the penalty of the despoiler shall be, that if the thing be his own of which he has usurped seysine to himself without a judgment, that the despoiler shall restore it with the produce which has been received and is to be received; and shall with difficulty be heard on the question of property in future. But if it be another's property, he shall restore it in the same way, and shall never subsequently be heard on the question of possession or of property.

Chapter XXX.

1. Of trespasses, and when the assise falls into a trespass terminated by a jury, and not after the manner of an assise.

A tenant is on many occasions entitled to an exception against a claimant by reason of the tenement, as if he who complains cannot have the freehold, but another has it, as if a keeper or farmer, a creditor or a serf are plaintiffs and seek restitution by an assise, they are not entitled to an assise, but the lord of the property is so in whose name they are in possession, because the exception of freehold parries their action. Likewise a tenant is entitled to an exception by reason of the tenement and of the thing, which is sacred and hallowed, such as are places dedicated to God, and which cannot be possessed by any one, and on that account no one is entitled to an assise, and in which case an assise fails, and there is no writ, and the assise is turned into a jury to inquire concerning the trespass, if it has been made on consecrated ground, because there is there no disseysine, so that the trespass may be amended by a jury, and both parties, the claimant as well as the trespasser, are amerciable, to wit, the claimant for his false claim, the trespasser for his

gressor pro transgressione. Item si tenementum fuerit universitatis vel publicum, & in civitate vel burgo, si ibi fuerit ædificatum vel præsumptum, ad dominum regem pertinet emendatio. Et erit ibi potiùs transgressio & purprestura, quàm aliqua disseysina. Si autem via publica, vel regia extra civitatem vel burgum, eodem modo pertinet ad regem emendatio. Si autē locus fuerit cōmunis alicujus universitatis, extra civitatem vel burgum, qui deputatus sit ad aliquem usum communem, hic erit transgressio & non disseysina, & fiat judicium ut supra.

Cap. XXXI.

f. 211.

1. Quod exceptio datur tenenti, si erratum fuerit nomine villæ. Britton, ii. ch. xix. § 4. Fleta, 242.

Datur etiam exceptio tenenti contra querentem ex nominatione villæ, dicitur enim, de libero tenemento suo in tali villa, ut licet non sit error de tali loco, tamen errare poterit quis, ut si credat tenementum esse in uno cōm̃ vel in una villa, cùm sit in alio cōm̃ vel in alia villa. Item quia credit quis unicam mansionem esse villam, cùm non sit. Et unde videndum est, quid sit mansio, & quid sit villa. Et sciendum, quòd de jure gentium agris sunt termini positi, ædificia sunt collata sive vicinata, & ex qua collatione fiunt civitates & villæ, & ex pluribus ædificiis collatis & vicinatis, & non ex uno[1] ædificio constructo.[2] Ut si quis in agris unicum faciat edificium, non erit ibi villa, sed cùm ex processu temporis inceperint coadjuvari & vicinari plura ædificia, incipit esse villa, & sic poterit tenementum esse in tali villa & non priùs, & tamen villa ad quam priùs ager ille pertinebat non desinit esse villa, sed utraq; stat in suo nomine, & sic villa ultimò vicinata habet suos terminos, & sua tene-

[1] "unico," MS. Rawl. C. 160. | [2] "constitutæ," *id.*

trespass. Likewise if the tenement has been that of a corporation or public, and in a city or a borough, if it has been built upon or encroached upon, the correction will appertain to the lord the king. And there will be there rather a trespass or a purpresture than a disseysine. If also it should be a public road or the king's highway outside a city or a borough, in the same way the correction appertains to the lord the king, but if the place should be the common ground of a corporation, outside a city or a borough, which has been deputed for some common use, here there will be a trespass and not a disseysine, and let judgment take place as above.

Chapter XXXI.

f. 211. 1. That the tenant is entitled to an exception, if there be an error in the name of the township.

An exception is allowed to the tenant against the claimant, if there be an error in the name of the vill, as although there be no error concerning such a place, nevertheless a person may make an error, as if he believes the tenement is in one county or in one vill, when it is in another county or in another vill. Likewise because a person believes that a single mansion is a vill, when it is not. And hence we must consider what is a mansion, and what is a vill. And it is to be known that under the law of nations boundaries are set to fields, edifices are connected or built near one another, and from which connection cities and vills are formed, and from several edifices connected together or adjoining each other, and not from one edifice constructed. As if a person should build a single edifice in the fields, there will not be there a vill, but when in process of time several edifices have begun to be built adjoining to or neighbouring to one another, there begins to be a vill, and so a tenement may begin to exist in such a vill and not before, and nevertheless the vill to which that field formerly pertained, does not cease to be a vill, but each stands in its own name, and so the vill with its last cluster of edifices has it boundaries and its definite tene-

menta diffinita. Oportet quòd tenementum ita sit in una quòd non sit in alia, ut si fuerit in villa priùs vicinata, sit in una tantùm & non in alia. Si autem in villa posterius fundata, sic esse poterit in utraq; sive qualibet earum p se. Sed non sunt ita in una quin sint in alia primò vicinata, habita consideratione ad prioritatem, quia id quod priùs dignius est, & ita poterit tenementum esse in una villa & in alia, sed non convertitur, quia id quod est in villa priùs vicinata, non erit in villa quæ posterius fundatur, & sic in una & non in alia, ratione & privilegio prioitatis. Sed id quod est in villa posterius vicinata & fundata continebitur in villa priùs vicinata, & sic esse poterit tenemētum omninò in utraq; villa, & ita in una quòd nihil in alia, sive sint ibi diversi com̃ & diversa feoda & diversa dominia. Item poterit esse tenementum in una villa & in alia, sed distingui debet quantum in una quantum in alia: sed si totum sit in una ex duabus, sed dubitetur in qua, & querens mentionem faciat in brevi de utraq;, dicendo quòd in tali villa & in tali, videtur quibusdam q non sufficit si p̣bet tenementum esse in una, nisi probaverit tenementum esse in utraq;, & si defecerit, quòd ex toto cadat assisa, cùm teneatur probare duo, & defecerit in uno. Sed quoniam ita temperare debemus negotium, quòd res magis valeat quàm pereat, & p̣cedet assisa pro eo quòd totum tenementum est in una, sive faciat p̣ querente, sive contra ipsum, & pro ea parte in qua defecerit, sit in misericordia pro falso clamore, & eodem modo fiet, si nec in una nec in alia, & sic in neutra. Si autē solum̃odo unica mansio ibi fuerit, non erit ibi

ments. It is necessary that the tenement shall be so entirely in one vill as not to be in another, as if it be in a vill of a prior cluster of edifices, it should be in one vill only, and not in another. But if it be in a vill subsequently founded, it may be so in both or in either of them by itself. But they are not so entirely in one but they may be in another cluster of edifices, regard being had to priority, because that which is first is more worthy, and so a tenement may be in one vill and in another, but it is not convertible, because that which is in a vill of a prior cluster of edifices, will not be in a vill which is founded afterwards, and so in one and not in another by reason of and through privilege of priority. But that which is in a vill of a subsequent cluster of edifices subsequently built shall be contained in a vill of a prior cluster of edifices, and so a tenement may be altogether in both vills, and so in one as not to be at all in the other, if there be there different counties and different fees and different demesnes. Likewise a tenement may be in one vill and in another, but it ought to be distinguished how much in one and how much in the other, if however it be altogether in one out of two, but it be doubted in which, and the claimant makes mention in the writ of both, in saying that it is in such a vill and in such a vill, it appears to some that it is not sufficient if he proves the tenement to be in one, unless he proves it to be in both, and if he fails, that the assise fails altogether, since he is bound to prove both, and has failed in one. But since we ought to regulate the matter so that the substance should prevail rather than perish, the assise also shall proceed on the ground that the whole tenement is in one vill, whether it makes for the claimant or against him, and for that part in which he has failed let him be amerced for his false claim, and in the same way shall it be, if the tenement is neither in one nor the other, and so in neither. But if there be only a single mansion there, there will not be a vill there, and therefore the assise

villa, & ideò cadit ibi assisa. Item cadit assisa si error fuerit in nomine villæ, vel in sillaba vel in litera, quæ veritatem nominum inducunt, ut supra de erroribus pleniùs. Item quandoque cadit breve & non assisa, ut si tenens excipiat contra breve ita, quòd tenementum non est villa[1] in brevi comprehensa, sed in alia, & querens dicat contrarium, per officium judicis inquiratur (prestito sacramento) utrum tenementum sit in una vel in alia, & sive dicant juratores quòd hic vel ibi, tamen ꝑpter hoc non terminatur negotiū, quia exceptio opponitur contra breve & non contra assisam. Et ideo stat assisa, & non erit locus joco partito si partes consentire vellēt, quòd unus amittat si ita sit, & si non sit, quòd alius lucretur. Quia si juratores dicant quòd tenementum non sit in villa in brevi nominata, cadit breve & non assisa. Et unde ad consimile breve redire poterit, sive petat licentiam recedendi de brevi suo & habeat, sive sine licentia à brevi illo se retrahat. Quia quicūq; propter breve male impetratum, sine licentia à brevi se retraxerit, propter hoc se non retrahat ab actione. Si autem dicant juratores quòd tenementum est in villa in brevi nominata, sive ita sit, vel quòd sit in alia, procedet assisa, & ꝑ assisam terminabitur negotium, & non erit locus convictioni: quia utraq; pars de hoc se posuit in juratam. Nec si propter hoc, quòd juratores dixerint quòd tenementum sit in alia villa, si subtraxerit querens & egerit per aliud breve, & ꝑ alios juratores forte, & ipse dicant contrarium juratoribus primis, cùm nulla sit opposita talis exceptio à tenente, nihilominus procedet assisa. Nec primi juratores per hoc convincuntur de perjurio, nec ulteriùs curandum est de tali excep-

Britton, i. ch. xvii. § 8.

f. 211 b.

[1] "in villa," MS. Rawl. C. 160.

there fails. Likewise the assise fails if there be an error in the name of the vill, or in a syllable or in a letter, which import the truth of the names, as above concerning errors more fully. Likewise sometimes the writ fails and not the assise, as if the tenant should except to the writ thus that the tenement is not [in] the vill comprised in the writ, but in another, and the claimant should say the contrary, let inquiry be made through the office of the judge (upon the administration of an oath) whether the tenement is in one or in the other, and whether the jurors say that it is here or is there, nevertheless the business is not thereby terminated, because the exception is taken to the writ, and not to the assise. And therefore the assise stands, and there will be no place for an alternative bargain, if the parties will consent to it, that one shall lose if it be so, and if it be not so the other shall gain. Because if the jurors should say that the tenement is not in the vill named in the writ, the writ falls, and not the assise. And hence [a party] may have recourse to a similar writ, whether he seeks and obtains a license to withdraw from his writ, or he withdraws from his writ without a license. Because whoever on account of a writ badly sued out has withdrawn from the writ without a license, must not on that account withdraw from the action. But if the jurors say that the tenement is in the vill named in the writ, whether it be so, or it be in another, the assise shall proceed, and the business shall be terminated by the assise, and there shall be no place for a conviction, for each party has gone to the jury on this subject. Nor if on this account that the jurors have said that the tenement was in another vill, if the claimant has withdrawn it and has proceeded by another writ, and by other jurors perhaps, and they say the contrary to the first jurors, since no such exception has been raised by the tenant, nevertheless the assise shall proceed. Nor are the first jurors thereby convicted of perjury, nor is any further care to be given to such an

f. 211 b.

tione, quia non est multum de substantia negotii tamen quia semel terminata est de consensu partium per juratam, nec, si tenens illam proponere vellet in secundo judicio per aliud breve, audiri non debet, tanquam sibi ipsi contrarius, cùm contraria allegans audiri non debet. Si autem juratores forte dubitaverint & nesciverint in qua villa tenementum illud fuerit, inquiraŧ primò à querẽte, si aliquid clãet in villa nõ nõinata, & eodẽ modo à teñte, si aliquid clãet in villa nõinata, quo casu si dicat q nõ, cadit assisa sed nõ breve, sed statī sine alio brevi fiãt ratiõabiles divisæ inter villas & inter mãeria, secũdũ q distincta fuerīt p certas divisas. Eodẽ vero modo fiat, si fuerit cõtẽtio de finib[9] & terminis agrorum & comitatuũ, ut si tenens dicat q in uno coñ & querens in alio, & inde se posuerint super juratam, & juratores sciant distinguere fines & terminos coñ, per eorum sacramentum procedat negotium, ut si dicant quòd in coñ non nominato fuerit tenementum, quòd cadet breve, & per aliud breve procedet negotium modo quo supradictum est. Si autem in coñ nominato, quòd tunc procedat assisa, & per assisam terminetur negotium. Si autem juratores nullo modo distinguere vel determinare sciant fines & terminos comitatuum, non propter hoc cadit breve, sed sine aliquo brevi per officium judicis cadit assisa in perambulationem, & perambulatio terminabit negotium. Dum tamen, ut prædictum est, partes priùs coarctentur ad certum, & ita quòd à querente sciatur, si aliquid clamet in comitatu non nominato, & e converso

exception, for it is not much of the substance of the business; nevertheless since it has once been terminated with the consent of the parties by a jury, the tenant, if he wishes to propound it in a second judgment by another writ, ought not to be heard, being as it were in contradiction with himself, since he ought not to be heard when alleging the contrary. But if the jurors have been in doubt perchance, and have been ignorant in what vill that tenement was, let inquiry be first made from the plaintiff, if he claims anything in the vill not named, and in the same way from the tenant if he claims anything in thē vill named, in which case if he says that he does not, the assise falls, but not the writ, but forthwith without any other writ let there be made reasonable lines of division between the vills and between the manors, according as they may have been distinguished through means of certain lines of division. In the same way let it be done if there should be a contention concerning boundaries and limits of fields and counties, as if the tenant should say that it is in one county, and the claimant should say that it is in another county, and they should thereupon go to a jury, and the jurors know how to distinguish the boundaries and limits of counties, let the business proceed by their oath, as if they should say that the tenement was in a county not named, the writ shall fail on that account, and the business shall proceed by another writ in the manner above mentioned. But if in the county named, then the assise shall proceed, and the business shall be terminated by the assise. But if the jurors know not in any manner to distinguish and to determine the boundaries and limits of the counties, the writ does not on that account fall, but without any writ through the office of the judge the assise falls into a perambulation, and a perambulation shall terminate the business. Provided, however, as aforesaid, the parties are first narrowed to a certain limit, and so that it shall be known from the claimant, if he claims anything in the county

à tenente, si aliquid clamet in comitatu nominato, & sic procedit perambulatio, habita tamen ratione, utrum querens fuerit majoris ætatis vel minoris, quia nullus minoris ætatis consentire poterit in perambulationem, & unde sine consensu non procedit perambulatio ante ætatem. Item si juratores dicant & bene sciant quòd quædam pars tenementi, unde visus factus est, sit in villa vel comitatu nominatis, & quædam in villa vel comitatu non nominatis, procedet assisa pro ea parte tenementi quæ est in villa & in comitatu nominatis, & pro alia non, & uter in misericordia.

2. Quod assisa cadit in perambulationem. f. 212. Britton, l. ii. ch. xvii. § 8. Fleta, 242.

Item cadit assisa in perambulationem propter incertitudinem, de consensu partium prædicto modo: ut si fuerit contentio inter partes in qua baronia, vel in cujus feodo tenementum fuerit, & juratores nesciant designare, & sic p perambulationem terminabitur contentio. Item quandoq; fit perambulatio inter dominum regem & querentem, si per ballivos domini regis facta fuerit disseysina nomine ipsius regis, & quo casu, si disseysina manifesta fuerit, expectanda erit voluntas domini regis quòd procedat assisa vel non procedat. Si autem incertum sit utrum tenementum sit domini regis vel querentis, & fiat contentio de finibus agrorum, sicut in dominicis domini regis, tunc ex præcepto & voluntate domini regis fiat perambulatio, ut de termino S. M. anno reg. H. 8, incipiente 9, in coñ Eborum, assisa novæ disseysinæ, si Rogerus clericus & alii. Et eodem modo facta fuit perambulatio inter dominum regem & Richardum de Percy in eodem coñ per 12 milites, qui postea scire fecerunt justiciariis de banco perambulationem illam.

which is not named, and conversely from the tenant, if he claims anything in the county named, and so the perambulation proceeds, regard, however, being had to the circumstance whether the claimant is of age of majority or of minority, for no one of minor age can consent to a perambulation, and hence a perambulation cannot proceed without consent before the age of majority. Likewise if the jurors say and know well that a certain part of the tenement from which the view has been made, is in the vill and county named, and a certain part is in a vill and county not named, the assise shall proceed for that part of the tenement which is in the vill and county, and not for the other, and each party shall be amerciable.

2. That an assise falls into a perambulation. f. 212.

Likewise an assise fall into a perambulation on account of uncertainty, with the consent of parties in manner aforesaid, as if there shall have been a contention between the parties, in what barony or in whose fee a tenement is, and the jurors do not know how to designate it, and so the contention shall be terminated by a perambulation. Likewise a perambulation sometimes takes place between the lord the king and a claimant, if a disseysine has been made by the bailiffs of the king in the name of the king himself, and in which case if the disseysine is manifest, the pleasure of the king will have to be waited for, that the assise shall proceed or not. But if it be uncertain whether the tenement belongs to the king or the claimant, and there is a contention about the boundaries of fields, as in the demesnes of the lord the king, then upon the precept and the pleasure of the lord the king let there be a perambulation, as in St. Michael's term in the eighth and ninth years of the reign of king Henry in the county of York, an assise of novel disseysine, if Roger the clerk and others. And in the same manner a perambulation was made between the lord the king and Richard de Percy in the same county by twelve knights, who afterwards certified the justices of the bench concerning that perambulation.

3. Quod cadit assisa omnino propter incertitudinem juratorum.

Britton, l. ii. ch. xix. § 3. Fleta, 243, § 4.

Item propter incertitudinem rei cadit assisa, omninò, nec vertitur in juratam, nec in perambulationem, sicut videri poterit inter mulierem & warantum suum de dote sua ante assignationem dotis, ut si ambo ejecti fuerint de tenemento & mulier per se petat restitutionem de tertia parte, per assisam non recuperabit, quia suam tertiam partem designare non potest, quia nunquam fuit specificata, nec ei assignata. Eodem modo si hæres eam dejecerit de toto, cùm ad ætatem pervenerit, versus eum non recuperabit per assisam prædicta ratione, qualecunque sit feodum, sokagium, vel feodum militare. Ad hoc facit in ultimo itinere M. de Pateshull in com̃ Norff. assisa novæ disseysinæ si Gylbertus filius Gylberti &c. Eodem modo dici poterit inter alios qui tenent in communi ante divisionem, sicut sunt cohæredes & participes vel vicini, si de consensu teneant in communi, propter contentionem habitam ex causa transactionis. Et unde si quis à latere omnes ejiciat, vel aliquem ipsorum, & unus per se restitutionem petat de aliqua certa parte, nihil capiat per assisam, quia aliquam certam partem designare non potest. Si autem totam petat unus vel omnes tenendam in communi, bene procedet assisa. Idem erit & si particeps à participe ejiciatur, & ita fiat de aliis hujusmodi, quæ tenentur in communi. Et quid si dicatur, in tali manerio? Et sciendum quod maneriū poterit esse per se ex pluribus ædificiis coadjuvatū, sive villis & hamlettis adjacentibus. Poterit etiam esse manerium & per se & cum pluribus villis & cum pluribus hamlettis adjacentibus, quorum nullum dici poterit manerium per se, sed villæ sive hamletta; poterit etiam esse per se manerium capitale, & plura continere sub se maneria non capitalia, & plures villas & plures hamlettos, quasi sub uno capite & dominio

3. That the assise fails altogether through the uncertainty of the jurors.

Likewise on account of the uncertainty of the subject matter an assise fails altogether, nor is it turned into a jury, nor into a perambulation, as may be seen between a woman and her warrantor concerning her dower before the assignment of her dower, as if both have been ejected from a tenement, and the woman by herself seeks restitution of the third part, she shall not recover by an assise, because she cannot designate her third part, because it has never been specified nor assigned to her. In the same manner if the heir has expelled her from the whole of it, when he has come of age, she shall not recover against him by an assise for the aforesaid reason, whether it be a fee, a sockage, or a military fee. This is supported by a case in the last iter of Martin de Pateshull in the county of Norfolk, an assise of novel disseysine, if Gylbert son of Gylbert, &c. In the same manner it may be said between others who hold in common, before a division, such as are coheirs and parceners or neighbours if by consent they hold in common, on account of a contention happening out of a cause of compromise. And hence if some collateral claimant ejects them all or one of them, and one by himself seeks restitution of a certain part, he will take nothing by an assise, because he cannot designate any certain part. But if one or all claim the whole to be held in common, the assise will fitly proceed. The same thing will happen if a parcener be ejected by a parcener, and let it be so done with other things of this kind which are held in common. And what if it be said, "in such a manor"? And it is to be known that a manor may by itself be combined of several edifices, whether vills or hamlets adjacent. For a manor may exist both by itself and with several vills and with several hamlets adjacent, none of which can be described as a manor by itself, but as vills or hamlets, for there may be a chief manor by itself, and it may contain several under it, manors which are not chief manors, and several vills and several hamlets, as if under one

uno. Item cadit assisa propter incertitudinem loci, sicut coñ vel villæ ut supra, ut si querens in visu faciendo docere nesciat in quo loco tenementum fuerit de quo queritur, nec juratores designare, licet eis constiterit in quo coñ vel in qua villa. Si autem constare possit in quo loco, sed non in qua parte loci, quia divisæ vel lapides finales amoti sunt, tamen procedet assisa, quia de re certa in loco certo agitur, & si querens per assisam optinuerit, habebit tantundem
f. 212 b. tenementi in aliqua parte loci, dum tenementum non de meliori nec deteriori sed mediocri, & hoc ex æqui-
Britton, ii. ch. xix. § 4. tate. Itē cadit assisa quandoq; ꝑpter incertitudinē ꝑsonæ, quia juratores de eo forte nullā habēt notitiā, ꝑ quā scire possint quid sit, vel utrum in possessione fuerit nomine ꝑprio vel alieno. Itē cadit assisa ꝑpter incertitudinē, ut si jus alicujus terre recognitū sit duobus, vel unus[1] se posuerit in seysinā sine participe, nulla facta mētione de partitione, & disseysitus fuerit nō recuperabit. Item si juratores nesciāt ad quē ptineat tenementū, tenentē vel querentē, cùm visum fecerint. Item si aliquis feoffatus fuerit de aliqua parte alicujus tenemēti, quæ nūquā ei fuit assignata in vita
Britton, ib. donatoris. Itē si due sorores tulerint assisam in cōmuni & objectum fuerit alteri q vir suus fuit utlagatus, nec constabat utrum mortuus vel vivus, ideò sine die, quia juratores nesciverīt partes distinguere, ut de itinere M. de P. in coñ Norff. an. regis H. 10. Item

[1] "et unus," MS. Rawl. C. 160.

head and one dominion. Likewise an assise fails on account of the uncertainty of the place, as of a county or of a vill as aforesaid, as if the claimant in making a view knows not to show in what place the tenement is concerning which he makes claim, nor the jurors to designate it, although it has been ascertained for them in what county or what vill. But if it be ascertained in what locality, but not in what part of the locality, because the divisions or boundary stones have been removed, nevertheless the assise shall proceed, because a certain thing in a certain place is under discussion, and if the claimant obtains it by an assise, he shall have so much of a tenement in some part of the locality, provided the tenement is not of a better, nor of a worse, f. 212 b. but of an intermediate quality, and this on principles of equity. Likewise an assise fails sometimes on account of the uncertainty of the person, because the jurors have perchance no knowledge of him, through which they may know what it is, and whether he has been in possession in his own name or another person's name. Likewise an assise fails for uncertainty, as if the right of any land has been recognised to be in two persons, and one of them has put himself into seysine without his parcener, no mention having been made of partition, and he has been disseysed, he shall not recover. Likewise if the jurors do not know to whom the tenement belongs, to the tenant or to the claimant, when they have had a view of it. Likewise if a person has been enfeoffed of a part of a tenement, which was never assigned to him in the lifetime of the donee. Likewise if two sisters have brought an assise in common, and it has been objected to one that her husband has been outlawed, and it is not ascertained whether he is alive or dead, accordingly it is put off without any day being fixed, because the jurors cannot distinguish, as in the iter of Martin de Pateshull in the county of Norfolk in the tenth year of king Henry. Likewise the names of

nomina villarum designanda sunt, sicut nomina hominū. Nomina cõm̃, hom̃, & villarū significādarū gr̃a cõperta sunt & inventa, et res et p̃sonæ designātur ex nomine, & unde oportet q̃ non magis sit defectus in nominibus villarum quàm hominū, nec in litera nec in sillaba, nec in parte aliqua, ut supra de erroribus.

Cap. XXXII.

1. Quod exceptio datur tenenti ex termino, quia dicitur post talem terminum.

Apponitur etiam terminus in brevi, quia assisa nove disseysine infra certū tēpus limitaī, & ultra nō extēdiī. Tēpus enim est modus tollēdę obligationis & actionis, quia currit tempus contra desides & sui juris cōtēptores. Et poterit quis amittere actionē & assisam suā p̃ negligenţiā, & inde habebit tenēs cōtra querentē exceptionē. Et eodē modo sicut tempus est modus tollendæ obligationis et actionis, ita erit modus inducendæ obligationis et actionis, et ex tempore acquirit quis sibi actionē, ut si quis se intruserit vel aliū sine judicio disseysiverit, si statim non rejiciatur, post tempus habebit actionē, si fuerit ejectus.

2. Si ballivus sine domino respondeat, qualem habeat potestatem, et quid possit et quid non. Glanville, l. i. ch. 12.

Itē cōtineī in brevi, pone p̃ vadiū et salvos plegios talē vel ballivū suum, si ipse inventus nō fuerit, unde vidēdū erit quid p̃tineat ad ballivum, et quid non. Et sciendū q̃ nō potest ballivus quicquid potest dñs suus. Nō potest animo cognoscere disseysinā, quò minus p̃cedat assisa, sed p̃ assisam veritas declarabiī. Itē nec potest[1] transigere nec pascisci,[2] nec jocum partitum facere nec aliud, quò magis dñs suus seysinam amittat toto vel in parte, nisi hoc sit p̃ judicium et assisam:

[1] "non potest," MS. Rawl. C. 160.

[2] "pacisci," MS. Rawl. C. 159.

vills are to be designated, just as the names of men. The names of counties, of men, and of vills have been found out and invented for the sake of marking them out, and things and persons are designated by name, and hence it is incumbent that there should not be any defect in the names of vills any more than of men, neither in a letter, nor in a syllable, or in any part, as above on the subject of errors.

Chapter XXXII.

A term is also mentioned in the writ, because an assise of novel disseysine is limited within a certain time and does not extend beyond it. For time is a mode of removing the obligation and the action, because time runs against the slothful and the undervaluers of their own right. And a person may lose his action and his assise through his own negligence, and a tenant has on that ground an exception against the claimant. And in the same way as time is a mode of removing the obligation and the action, so it will be a mode of bringing on an obligation and an action, and a person acquires by time for himself a right of action, as if a person has intruded himself or has disseysed another without a judgment, if he be not forthwith rejected, he will have after a time an action, if he should be ejected.

1. That an exception is allowed to the tenant upon the term, because it is said "after a certain term."

Likewise it is contained in the writ, "Put under bail "and good sureties such an one or his bailiff, if he be "not himself found;" hence we must see what pertains to the bailiff and what not. And it is to be known that a bailiff cannot do every thing that a lord can do. He cannot mentally acknowledge the disseysine, so that the assise shall not proceed, but the truth shall be declared by the assise. Nor can he compromise nor make a pact nor accept an alternative risk, nor anything else whereby the lord should lose his seysine in whole or in part, unless it be by a judgment and assise, but an attorney may

2. If a bailiff without his lord answers, what power he has, and what he can do, and what not.

Britton, ii. ch. xv. § 3. Fleta, vi. ch. 11. Infr. l. v. ch. 8. § 1.

attornatus tamē hæc omnia facere potest. Est igitur differentia magna inter responsalem et attornatum,[1] dicere tamen potest (sicut ipse dūs principalis) contra assisam, quare remaneat imperpetuum vel ad tempus. Item dicere poterit cōtra juratores, et causam suspicionis prætendere. Itē dicere poterit contra juratores et contra querentem et contra ipsum justiciarium, si fortè jurisdictionē nō habuerit, et contra breve, et generaliter omnes habebit exceptiones quas haberet ipse dominus principalis. Item habere debet vic. nomina pleg. et breve. Nomina plegiorum, ut si querens fortè se retraxerit, omnes plegii remaneāt in misericordia. Et ei facienda securitas, quia commoda sequi debent, quia si securitas defecerit, difficil. erit ꝑsecuc̄ satisfactionis, hoc est misericordiæ, ꝑpt̄ libertates dico. Itē breve, ut ex brevi habeāt justitiarii potestatem cognoscendi. Si autē breve nō habeat corā justitiariis, tūc vidēdū erit utrū res integra sit vel incepta, cū breve forte sit depditū, quāvis ī com̄ publicè lectū & auditū. Si autem res sit integra, ita q nec juratores electi, nec visus tn̄ti factus, alio brevi opus erit. Si autem non sit integra, sed breve publicè in com̄ lectum et auditum, et visus terræ factus, procedet assisa quamvis breve sit deperditum.

f. 213.

Cap. XXXIII.

1. De iis quæ impediunt restitutionem ad tempus, vel in perpetuum.

Quædā sunt quæ restitutionē impediūt ad tēpus, et quædā imperpetuū: imperpetuum, ut cùm cadant in assisam p̄juditialia sunt et prius debent terminari quam exceptionē pimūt pemptoriam, cùm primò fuerint ꝑpo-

[1] "attornatus" down to "attornatum" omitted MS. Rawl. C. 160; inserted C. 159. The passage is probably a side-note which has crept into the text. "Responsalis" is the term used by Glanville, but it is not found in Britton.

do all these things. But there is a great difference between a respondent and an attorney, but he may speak (like the principal lord himself) against the assise, wherefore it should be stayed for ever or for a time. Likewise he may speak against the jurors, and hold out a cause of suspicion. Likewise he may speak against the jurors and against the claimant, and against the justiciary himself, if he by chance has not jurisdiction, and against the writ, and generally he has all the exceptions which a principal lord would have. Likewise the viscount ought to have the names of the sureties and the writ. The names of the sureties, so that if the claimant by chance has withdrawn himself, all his sureties may remain amerciable. And security is to be given to him, since the advantages ought to follow, because if a security is wanting, the prosecution of the satisfaction, that is of the amerciment, will be difficult, on account of the franchises I mean. Likewise the writ, so that from the writ the justiciaries may have the power of taking cognisance. But if he have not the writ before the justiciaries, then it must be seen whether the business is fresh or has been commenced since the writ may have been by chance lost, although publicly read and heard in the county. But if the business be fresh, so that neither the jurors have been chosen, nor a view of the tenement held, there will be need of another writ. But if it be not fresh, and the writ has been publicly read and heard in the county, and a view has been held of the land, the assise shall proceed although the writ be lost. f. 213.

Chapter XXXIII.

1. Of those things, which impede restitution for a time or for ever.

There are some things which impede restitution for a time, and some in perpetuity: in perpetuity, as when they fall into an assise they are prejudicial and ought to be terminated before they perempt a peremptory exception, when they are first propounded and terminated in

sita et terminãť in modū juratæ, et nō in modū assisæ. Et ideo nō recipiunt cōvictionē ꝑpter cōsensum partiū, cùm de hoc se gratis, vel de necessitate (ne sint indefensi) posuerint in juratā. Qualia sunt inprimis q̃stio stat^{9}, causa successionis, causa donationis, pactū, cōvētum sive cōvētio. Itē incertitudo, s. ubi de re sive de tenemento nulla omninò fieri possit certitudo, sed nō nisi cū difficultate. Itē voluntas sive dissimulatio, q̃a forte disseysit^{9} voluit disseysiri, et sive hoc voluit ab initio sive post tēp^{9}. Itē trāslatio, q̃a forte disseysitus remisit injuriā, et quietū clamavit tenemētum. Itē cōfirmatio sive cōsensus, ut si disseysitor ex voluntate disseysiti dederit rē disseysitā alteri, et disseysitus donum cōfirmaverit, et alio modo ratū habuerit ab initio, vel ex post facto. Itē ꝑpria usurpatio rei ꝑpriæ post disseysinā sine judicio sed post tēpus. Itē difficultas juditii, s. q̄ nullo modo terminari possit p justiciarios, sed nō q̄ alio modo, licet cùm difficultate. Itē res judicata, si justū intervenerit judicium. Itē finis factus et cyrographm̃. Itē intrusio in rē alienā, vel disseysina, si incōtinenti rejiciatur. Item negligentia quæ p cursum temporis excludit actionem et assisam. Item sunt quædā quæ assisam aut actionem nō perimunt, licet ad temp^{9} differāt, sicut exceptiones cōtra breve et cōtra psonas, sicut ex p̃missis satis apparet. Unde videndum erit, qualiter cadunt in assisā et termĩnāť p juratā, et de quibus nulla facta est men-

the manner of a jury, and not in the manner of an assise. And therefore they do not admit of a conviction on account of the consent of parties, since they have put themselves on a jury gratuitously or of necessity (that they may not be without a defence). But such are in the first place a question of *status*, a cause of succession, a cause of donation, a pact, a covenant, or an agreement. Likewise uncertainty, to wit, when there can be no certainty at all respecting the thing or the tenement, but not without some difficulty. Likewise willingness or dissimulation, because perhaps the person disseysed has been willing to be disseysed, and he has either wished this from the beginning or after a time. Likewise a transfer, because the person disseysed has remitted the injury, and has quitclaimed the tenement. Likewise a confirmation or consent, as if the disseysor with the will of the person disseysed has given the thing disseysed to another, and the person disseysed has confirmed the gift and in some other way has ratified it from the beginning, or after the act has been completed. Likewise one's own usurpation of one's own thing after a disseysine without a judgment or after some time. Likewise the difficulty of a judgment, to wit, which can be in no manner terminated by the justiciaries, but not in some other manner, although with difficulty Likewise a thing which has been judged, if a just judgment has intervened. Likewise a fine which has been made and a chirograph. Likewise an intrusion into another person's property, or a disseysine, if it be immediately repelled. Likewise negligence, which in course of time excludes an action and an assise. Likewise there are some things which do not perempt an assise or an action, although they may defer it for a time, as exceptions against a writ and against persons, as is sufficiently apparent from what has been premised. Whence it is to be seen, in what manner they fall into an assise and are determined by a jury, and concerning which no mention has been

tio superiùs. Et inprimis de exceptione status, ut si villenagiū apponat[1] in modū exceptiōis, ut supra de exceptiōib[9] villenagii plenius.

2. Si aliquis incidat in assisam causa successionis.

Incidit autē causa successionis tali modo. Esto q querens sic fundat intentionem suā, & dicat q de tenemēto tali obiit talis antecessor seysitus ut de feodo, & ipse sicut hæres suus ꝑpinquior se posuit in seysinā, & fuit in seysina ꝑ tātū tēpus, donec talis eū inde injustè ejecit. Ad q excipi poterit q talis antecessor nō obiit seysitus ut de feodo, sed ad vitā tenuit aliquo modo vel ad terminū vel ut vadiū, & ipse querens nihil habuit nisi ꝑ intrusionem, & statim fuit ejectus ꝑ tenentem qui est verus dominus, vel justus hęres, vel dñs capitalis, vel q posuit se in seysinā, licet hæres esse posset, super dominum capitalem, qui primā habuit seysinam ut dominus capitalis, & ipse se intrusit super seysinam suam, antequam sciretur utrum ipse hæres esset vel non, vel quis esset hæres, vel si obiit seysitus ut de feodo, ille querens non potuit esse hæres, quia nec fuit filius nec hæres, sed bastardus: f. 213 b. vel si filius & hæres ꝑpinquus, alius fuit ꝑpinquior, s. talis; ad q replicari poterit à querente, q ipse hæres est, & licet hæres esse nō posset, tñ fuit ibi ꝑ tātum tempus q ejici non debuit sine judicio, & aliæ infinitæ exceptiones inde elici poterunt, quæ omnes ꝑ assisam in modum juratæ terminantur & quæ non recipiunt convictionē, sed ista sufficiunt ad præsens, exempli causa; & de similibus vel diversis idem processus.

3. Si donatio cadat in assisam.

Si autem donatio incidat in assisā, multæ poterunt exceptiones competere ex donatione, ut si dicat

[1] "opponat," MS. Rawl. C. 160.

made above. And in the first place concerning an exception of *status*, as if villenage be objected in the manner of an exception, as above stated more fully concerning the exception of villenage.

2. If any person falls into an assise in a cause of succession.

But a cause of succession is incident in this manner. Let it be that a claimant thus founds his statement, and says that so-and-so his ancestor died seysed of such a tenement in fee, and he himself as his next heir has put himself into seysine, and was in seysine for so long a time, until such an one ejected him therefrom unjustly. To which it may be excepted that the said ancestor did not die seysed thereof in fee, but held it for life in some manner, either for a term or as security, and the claimant himself had nothing except by intrusion, and was forthwith ejected by the tenant who is the true lord, or the just heir or the chief lord, or who put himself into seysine, although there might be an heir, over the chief lord, who had the first seysine as chief lord, and he himself intruded himself over his seysine, before it could be known, whether he himself was the heir or not, or who was the heir, or if he died seysed of the property in fee, the claimant could not be the heir, because he was neither his son nor his heir, but a bastard; or if he be a son and near heir, another was next heir, to wit, so- f. 213 b. and-so; to which a replication may be made by the claimant, that he himself is the heir, and although he could not be the heir, nevertheless he had been there for so long a time that he could not be ejected without a judgment, and other infinite exceptions may be extracted therefrom, which are all determined by an assise in the manner of a jury, and which do not allow of a conviction, but they are sufficient for the present, for the sake of example, and concerning similar and different exceptions the process will be the same.

3. If a donation falls

But if a donation falls into an assise, many exceptions may be allowable upon the donation, as if the claimant

querens q fuit in seysina illius tenementi de donatione talis p tantum tēpus, donec talis eum ejecit: excipi poterit cōtra eum, q ille, qui donasse debuit, nunquā habuit inde aliquam seysinam q donationem inde facere posset, vel quia omninò nullam, vel quia si habuit tenementum priùs illud dedit tali p chartam suam, antequā aliquā chartam fecisset predicto querenti, ita respondere poterit, q si aliquā seysinā inde habuit, nullam habuit nisi post mortem donatoris p intrusionem, & de qua recenter fuit ejectus & incōtinenti. In quo casu cadit assisa in juratā, ut sciatur utrum seysinam habuit in vita donatoris vel non, & p hoc terminabitur negotium. Si autem nihil omninò sciverint de seysina, querens nihil capiat p juratam, si autem dubitaverint, p possessore erit judicandum. Si autem ita dicant, q de seysina querentis bñ certi sunt, & quo die positus fuit in seysinā, sed de morte donatoris nihil sciverint, quia obiit in remotis & in alio cōm̃: ideo in cōm̃ in quo obiit p aliam juratam inquiratur de veritate, & sic cōjunctis illis duabus inquisitionibus terminabitur negotium, & adjudicabitur pro una parte vel pro alia, & hoc sufficiat hic exempli causa.

4. Si conventio vel pactum cadat in assisam, vel modus donationis. Britton, l. ii. ch. xx. § 7. Fleta, 246.

Cadere etiam poterit in assisam pactum sive conventio, si apposita fuerit in initio donationis, & ita inerit donationi, & donationem informabit. Et eodē modo inesse poterit modus, conditio, & causa, & donationem informabunt: modus, ut si dicaī, Do ut facias; conditio, ut si dicatur, Do si feceris. Item potest conditio apponi sic q quis teneatur ad duo conjunctim, ut si dicatur, Do ut facias istud & illud, quo casu, nō

should say that he was in seysine of that tenement by the donation of such an one for so long a time, until so-and-so ejected him: it may be excepted against him, because he, who ought to have conveyed it to him, never had seysine thereof so as to be able to make a donation of it, or because he had none at all, or because if he had the tenement, he gave it first to such an one by his charter, before he had made a charter to the aforesaid person who is the claimant, it may be answered to him thus, because if he had any seysine thereof, he had none except after the death of the donor by intrusion, and from which he was recently and forthwith ejected. In which case the assise falls into a jury, that it may be known whether he had seysine in the life of the donor or not, and by this the business will be determined. But if they have known nothing of the seysine, the claimant will take nothing through a jury; but if they have doubted, he will have to be adjudged the possessor. But if they should say that they are well certain concerning the seysine of the claimant, and on what day he was put into seysine, but they have known nothing concerning the death of the donor, because he died in remote parts and in another county, on that account let an inquiry be made concerning the truth in the county in which he died, and so the affair shall be determined by these two conjoint inquests, and it shall be adjudged in favour of one or of the other party, and let this suffice here by way of example. into an assise.

A pact or convention may fall into an assise, if it has been introduced at the commencement of a donation, and so shall be inherent in the donation, and shall shape the donation. And in the same way a mode, a condition, a cause may be inherent in it and shall shape the donation. A mode, as if it be said, I give, that you may do: a condition, I give, if you shall have done; likewise a condition may be introduced so that a person may be bound to two things conjointly, as if it be said, I give 4. If an agreement or a pact falls into an assise, or a mode of donation.

sufficit unum fieri, nisi fiat utrunq̃. Vel potest fieri conditio ad duo disjunctim, s. si fecerit istud vel illud, quo casu sufficit unum fieri. Item alio modo poterunt inesse modus & conditio donationi, uno modo verbis affirmativis, ut si dicatur, Do ut facias. Eodem modo in verbis negativis, ut si dicatur, Do ne facias. Item potest esse modus sive conditio verbis affirmativis & negativis cōjunctim; & sic erit duplex: ut si dicatur, Do ut facias, & si nō feceris, volo q̃ terra data revertatur ad me vel alios tales, vel q̃ liceat mihi vel hæredibus meis ponere me in terram illam. Item e converso verbis negativis & affirmativis cōjunctim, & sic erit duplex; ut si dicaī, Do ne facias, & si feceris, tūc liceat mihi &c. Et sive satisfactum sit cōditioni sive nō, & unus se ponere possit in seysinā & se tenere in eadē, habebit exceptionem ex cōventione. Si autem intrare non possit ꝑpter vim tenentis, dabiī ei actio ex conventione, ut infra. Item fieri possit verbis negativis, ut si dicatur, Do ne facias sine consensu & voluntate mea, & si feceris, q̃ tunc ponam me &c. Et cū hoc fecerit, adhuc non sufficit fieri, nisi sciatur utrum hoc fecerit de voluntate vel contra voluntatem,
f. 214. quod probatur infra, ubi plus de hac materia, ut supra de donationibus. Cùm igitur querens proposita querela sua illam fundaverit sic: Et unde queritur q̃ talis injustè &c. disseysivit eum de tanta terra &c. quam habuit de dono ipsius talis. Et unde idem talis

that you may do this and that, in which case it is not sufficient that one thing be done unless both be done. Or a condition may be made of two things disjunctively, to wit, if he have this or that, in which case it is sufficient, if one be done. Likewise in another way there may be a mode and condition inherent in a donation, in one mode by affirmative words, as if it be said, I give, that you may do it. In the same mode by negative words, as if it be said, I give that you may not do it. Likewise there may be a mode or condition in affirmative and negative words conjointly, and so it will be double, as if it be said, I give that you may do a thing, and if you have not done it, I wish that the land given shall return to me or to certain other persons, or that it shall be permissible for me or my heirs to put myself into that land. Likewise conversely with negative and affirmative words conjointly, and so it will be double, as if if it be said, I give that you may not do so-and-so, and you shall do it, then it shall be permissible to me, &c. And whether the condition shall be satisfied or not, and one of the parties can put himself into seysine and keep himself in seysine, he will have an exception upon the convention. But if he cannot enter on account of the force of the tenant, he shall have an action upon the convention as below. Likewise it may be made in negative words, as if it be said, I give that you may not do it without my consent and will, and if you should do it, that then I will put myself, &c. And when he has done this, still it is not sufficient that it be done [merely], unless it be known whether he has done it with the will or against the will of the donor, which is proved below, where there will be more on this subject, as above on the subject of donations. When, therefore, a plaintiff having propounded his plaint has founded it thus: and hence he complains that so-and-so unjustly, &c. has disseysed him from so much land, &c., which he had by the gift of so-and-so himself: and whence the said so and f. 214.

cepit homagium suum & posuit eum in seysinā, vel ꝑ se vel ꝑ ꝑcuratorem suum, vel ꝑ litteras &c. Et unde fuit in seysina ꝑ tantū tēpus, donec idē talis ipsum injustè & sine judicio disseysivit, & inde posuit se super assisam. Et notandum generaliter, ꝙ omnis intentio querentis in assisa novæ disseysinæ fundari poterit secundùm omnia genera acquisitionis liberi tenementi, sive ex causa successionis, sive ex causa donationis, vel quacunq; alia, sive in feodo sive ad vitam, vel secundùm quod possessio alicujus pacificata fuerit vel turbata, vel secundùm quod disseysina facta fuerit in ipso principali, s. in corpore, vel in ipsius rei pertinētiis, sicut in jure, ut si quis jus habeat eundi vel pascendi in fundo alieno &c. Et talis venit & defendit ꝙ ipsum injustè non disseysivit, nec ei aliquam fecit injuriam, & bene cognoscit donum & homagium captum, et seysinam, et totum quod proponitur à querente. Sed dicit quòd antequam homagium suum capere vellet de tali tenemento, concessit idem querens, ꝙ si ille tenens infra certum tempus inquirere posset, ꝙ idem querens aliquid teneret in capite à dño rege, vel si quid faceret vel non faceret, et sic secundùm quancunq; conventionē (ut supra) bene liceret ei ingredi prædictum tenementum, et tenere sibi et hæredibus suis quietè imperpetuum sine aliqua contradictione et impedimento prædicti talis querentis et hæredum suorum. Et quia inquisivit infra p̃dictum terminum, ꝙ tenuit de dño rege talē terram et talem, vel quia fecit cōtra prædictā cōventionem, vel quia non fecit secundùm conventionē, ideò posuit se in seysinā, ꝑpter prædictā cōvētionē. Et unde dicit, ꝙ licet donatio valida esset et ꝑfecta ab initio, tñ effecta est invalida ꝑ prædictam cōventionē. Ad quod querens respondet

so took his homage and placed him in seysine either personally or by his agent or by letters, &c. And whereof he was in seysine during such a length of time, until the said so-and-so disseysed him unjustly and without a judgment, and thereon he has put himself upon an assise. And it is to be noted generally that every statement of the plaintiff in an assise of novel disseysine may be founded according to all kinds of acquisition of freehold, either by way of succession, or by way of donation, or in any other way, whether in fee or for life, or according as the possession of any one has been peaceable or disturbed, or according as the disseysine has been made in the principal tenement, that is, in the substantial part or in the appurtenances of it, as in a right, as if a person has a right of going and pasturing in another person's field. And the said person comes and defends that he has not unjustly disseysed him, nor has he done him any injury, and he acknowledges the gift, and the homage taken, and the seysine, and the whole of that which is set forth by the plaintiff. But he says that before he was willing to accept his homage for the said tenements, the said plaintiff granted, that if he, the tenant, within a certain time, could ascertain that he, the said plaintiff, held any thing in chief from the lord the king, or if he should do this or not do it, and so according to whatsoever convention (as above), it should be fully allowable for him to enter the aforesaid tenement, and to hold to himself and his heirs quietly in perpetuity without any contradiction and impediment from the aforesaid plaintiff and his heirs. And because he had ascertained within the aforesaid term, that he held from the lord the king such and such a land, or because he had done contrary to the said agreement, or because he had not done according to the said agreement, on that account he had put himself into seysine in accordance with the aforesaid convention. To which the plaintiff answers, and either denies altogether that

aut dedicit omninò illā cōventionem, aut cognoscit. Si autem cognoscat et factum sit contra, tunc erit manifestum q̄ nullā ei fecerit injuriā. Si autē illā omninò negaverit vel defenderit, cū ex tali negatione fiat res dubia, oportebit eū de necessitate q̄ illā p̄bet si fuerit extra seysinā, alioquin indefensus erit, quasi exceptio nulla, & p̄ hoc recuperabit querēs sine aliqua jurata, et si fuerit in seysina, dabit̄ ei exceptio. Probari vero poterit cōvētio p̄ scripturā, cū fuerit extra seysinā, ut si scriptū cōfectū fuerit īter eos super cōvētiōe p̄dicta ī p̄sentia virorū fide dignorū qui p̄sētes erāt, et audiētes p̄dictā cōvētionē ante captionē homagii vel post, et qui loqui possūt de p̄prio visu et auditu et que quidē si fuerit à querēte dedicta, p̄bet̄ charta et cōvētio p̄ testes, licet dōestici sīt, sīul cū aliis de jurata, vel p̄ collationē vel alio modo. Et si p̄batū fuerit instrumētū, sic manifestū erit q̄ talis fuit cōvētio: nō tamē p̄pter hoc p̄bat̄ q̄ satisfactū sit cōvētioni. Oportebit igit̄ ulteriùs p̄cedere investigādo p̄ assisā in modū jurate capiēdā, et p̄ testes nominatos in scripto utrū factū sit secūdū cōvētionē vel nō, vel si factū sit cōtra convētionē, utrū ita sit vel nō sit, secūdū q̄ dicit̄ in cōvētione. Et eodē modo erit p̄cedendum p̄batō scripto,
f. 214 b. et probata conventione, ac si ab initio nō essent concessa. Quia etsi concessa essent, adhuc videndū esset utrum satisfactum esset conventioni vel nō. Et quòd ita sit p̄cedendum, videri poterit p̄ chartā aliquam, quæ confecta est super donatione aliqua, ut si charta

convention, or he acknowledges it. But if he acknowledges it and it has been done contrary to it, then it will be manifest that he has done him no injury. But if he has altogether denied it or defended it, since upon such a denial the matter is rendered doubtful, it will be incumbent upon him from necessity that he should prove it, if he is out of seysine, otherwise he will be undefended, as if the exception were null, and thereby the plaintiff will recover without a jury, and if he be in seysine, the exception will be allowed him. But the convention may be proved by a writing, when he is out of seysine, as if a writing has been made between them upon the aforesaid convention in the presence of men worthy of credit who were present, and who heard the aforesaid convention before the acceptance of homage or after it, and who can speak from their own sight and hearing, and which if it be denied by the plaintiff, let the charter and convention be proved by witnesses, although they be domestics, together with others of the jury, or by comparison or in some other way. And if the instrument be proved, it will be thus manifest that there was such a convention; it is not, however, thereby proved that the convention has been satisfied. It will therefore be incumbent to proceed further in investigating by an assise to be taken in the manner of a jury, and by the witnesses named in the writing, whether it has been done in accordance with convention or not, or if it has been done contrary to the convention, whether it be in such manner or not, according to what is said in the convention. And the same proceedings must be had, upon the writing being proved and upon the convention being proved, as if they had not been conceded f. 214 b.
at the commencement. Because although they were conceded, it would still have to be seen whether the convention has been satisfied or not. And that the proceeding must be in this manner may be seen by any charter, which has been made upon any donation, as if

tātum fuerit dedicta, non sufficit nisi donum fuerit dedictum ; ut si dicat, defendo chartā, minus bene dicit. Si autem dicat, defendo donū & chartā, tunc oportet tenentē ꝑbare utrunq;. Si dicat tantum, defendo donū, adhuc sufficit, quia donum poterit esse validum & ꝑfectum etiā sine charta, & charta bene poterit esse vera, sed sine dono ꝑfectio vacua erit & invalida. Si autem donū fuerit ꝑfectum & validum, utrunq; juvari poterit ꝑ aliud, & sic donū poterit esse validum, licet charta sit falsa, & charta poterit esse vera, licet donū sit invalidum vel imperfectum, ut si donatarius se intruserit ꝑpria autoritate sine waranto. Igitur non sufficit ꝑbare chartam esse veram, nisi ꝑbetur donū esse validum & ꝑfectum. Igitur cùm ꝑbata sit scriptura & conventio, & oporteat de necessitate ulteriùs ꝓcedere, aut bene sciunt conventioni esse satisfactum, vel bene sciunt quòd non est satisfactum, & secundum hoc pro una parte vel pro alia terminabitur negotium. Si autē nihil omninò sciverit[1] de aliqua conventione, ꝑ hoc recuperabit querens quasi exceptione nulla. Si autē dubitaverit[2] utrum satisfactum fuerit conventioni vel nō, licet bñ cōstiterit eis de conventione facta, si præsumptiones inducant ꝑbabiles pro una parte vel ꝑ alia, in hoc dubio standū erit presumptioni, cùm nulla sit ꝑ aliqua parte vera probatio, quæ vincere possit ꝓsumptionē. Poterit tunc ꝓsumptio imposterū juvari, si fecerit ꝑ eo qui forte cōvētionē cognoverit, sed si in replicādo dicat illā esse remissam, si ꝑsumptio faciat ꝑ eo, juvari poterit præsumptio ꝑ instrumētū postea cōpertū ex parte illa, q̄ contineat veritatē. Si autem tenēs nullū omninò ha-

[1] "sciverint," MS. Rawl. C. 160. | [2] "dubitaverint," *id.*

the charter be gainsaid, it is not sufficient unless the gift has been gainsaid; as if he should say, I deny the charter, it is insufficiently said; but if he should say, I deny the gift and the charter, then it is incumbent on the tenant to prove both. If he should say only, I deny the gift, it is still sufficient, because the gift may be valid and perfect even without a charter, and the charter may very well be true, but without the gift its perfectness will be empty and invalid. But if the gift be perfect and valid, each may be helped by the other, and so the gift may be valid, although the charter be false; and the charter may be true, although the gift be invalid and imperfect, as if the donatory has intruded himself by his own authority without a warrant. Therefore it is not sufficient to prove the charter to be true, unless it be proved that the gift is valid and perfect. Therefore when the writing and the convention has been proved, and it is incumbent of necessity to proceed further, they either know well that the convention must be satisfied, or they know well that it has not been satisfied, and according to this the affair will be determined for one party or for the other. But if they know nothing about any convention, on that account the complainant shall recover, as if there were no exception. But if they have doubted whether the convention has been satisfied or not, although it is clear to them concerning the making of a convention, if they raise probable presumptions in favour of one party or of the other, in this state of doubt they must stand by the presumption, when there is no true proof on either side, which can overcome the presumption. The presumption may afterwards be assisted, if it has made for him who by chance has acknowledged the convention, but if in his replication he says that it has been remitted, if the presumption makes for him, the presumption may be assisted by an instrument found afterwards on that side, that it contains the truth. But if the tenant has no instrument at all, then

beat instrumentum, tunc oportet q̄ alio modo p̄bet exceptionem cōventionis. Et unde aut ponit se in assisam in modum juratæ capiendā aut nō. Si velit autē p̄bare p̄ domesticos & familiares suos exceptionē, hoc non licet. Si autem p̄ domesticos & familiares partis alterius, hoc nō p̄dest. Si autē cōmuniter p̄ utroq̄ nūquā cōveniēt. Oportet igit̄ de necessitate recurrere ad assisam, assūptis aliquib⁹ qui interfuerint cōvētioni, dū tamē neutrā partē cōtingāt. Si autē instrumentum nō habuerit, nec se ponere voluerit in juratā, habet tamen sectā unā vel plures forte, sive sint familiares sive non, ex secta sua habet ad minus p̄sumptionem, & standum erit p̄sumptioni, donec probet̄ in contrarium. Probari poterit contrarium per defensionem & per legem, quia lex vincit sectam. Item esto, quòd donator per conventionem non sufficiat quòd se ponere possit in seysinam, dabitur ei actio ex conventione, cùm sit extra seysinā, & ad superiorem erit recurrendum. Et unde cùm quis sit in seysina, dabitur ei exceptio ex conventione.

5. Quæ impediunt restitutionem.

Item incertitudo, sive fuerit in ipsa re sicut in corpore & tenemento, sive in jure pertinente ad tenementum, sive in ipsa persona quæ queritur, non dico si aliqua ratione possit esse certitudo vel saltem p̄sumptio, immo si omninò nulla haberi poterit certitudo, etiam nec p̄sumptio. Item negligentia sive dissimulatio ad tempus, quæ trahuntur ad consensum, impediunt restitutionē, non tamē quòd omnino tollatur actio, sed quòd auferatur disseysito recens rejectio. Et dissimulatio & magna negligentia; q̄ trahitur ad consensum, dat quasi liberum tenementum disseysitori, ita quòd sine judicio ejici non potest, & tollit privilegium disseysito: quia ex quo negligens est, præsumitur ad minus quòd voluit disseysiri, p̄ quod præsumitur

f. 215.

he must prove in some other way an exception against the convention, And thereupon he either does put himself upon an assise to be held in the manner of a jury, or he does not. But if he wishes to prove his exception by his own domestics or family, this is not allowed. But if by the domestics and friends of the other party, this is not advantageous. But if in common by both, they will never agree. It behoves therefore of necessity to have recourse to an assise, by assuming certain persons who were present at the convention, provided they are not related to either party. But if he has not an instrument nor is willing to put himself on a jury, he has however a sect, one or perhaps more, whether they are members of his family or not, he has from his sect a presumption at least, and the presumption must prevail, until it be proved to the contrary. The contrary may be proved by a denial and by the law, for the law overpowers a sect. Likewise let it be that a donor by a convention does not suffice to be able to put himself into seysine, he will have an action upon the convention, since he is out of seysine, and he will have to have recourse to a superior, and hence when a person is in seysine, he will have an exception upon the convention.

5. What things impede restitution.

Likewise uncertainty, whether it be in the thing itself, as in the substance and the tenement, or in the right appertaining to the tenement, or in the person who complains, I do not say if by any means there can be certitude or at least a presumption, nay if there could be no certitude, nor even presumption: likewise negligence or dissimulation for a time, which are taken for consent, f. 215. impede restitution, not however so as to take away all right of action, but so that there is taken away from the disseysed party a recent rejection. And dissimulation and great negligence, which are taken for consent, give as it were a freehold to the disseysor, so that he cannot be ejected without a judgment, and takes away from the person disseysed his privilege, for since he has been negligent, it is presumed at least that he was willing to

etiam q utramq; amiserit possessionem, naturalem videlicet & civilem. Item eodē modo volūtas, si hoc voluit ab initio vel post tempus, injuriam remiserit, & tenementū quietū clamaverit. Itē impedit restitutionem transactio, ut si partē tenementi remiserit & partem receperit nomine concordiæ, quod quidem de gratia ei concedi poterit, & pro bono pacis & non de jure, quia de iis quæ præsumpta sunt contra pacem domini regis, nulla erit transactio sive concordia, sed ipsum judicium, secundùm quod querens se retraxerit, vel ipse disseysitor cognoverit disseysinam. Item confirmatio vel consensus impediunt restitutionem, ut si disseysitus confirmaverit disseysitori rem disseysitam, quia confirmatio gratuita tollit injuriam. Consensus, ut si disseysitor donationem fecerit, & disseysitus donationi consenserit & illam ratam habuerit, sive ab initio sive post tempus. Item propria usurpatio rei ꝑpriæ post disseysinam sine judicio sed post tempus, ut si disseysitus fuit quis, & negligens fuerit in impetratione vel ꝑsecutione vel utroq; sine judicio rē ꝑpriā sibi usurpare non poterit (ut supra) poterit tamē illam recipere, si ei gratis offeratur, aliquando tamen, sed nō semper: verbi gratia, A. disseysiat B., C. disseysiat A., vel forte A. dat tenementum C., B. impetrat contra A., A. timet ꝑpter disseysinā & assisam, ejicit C. sine judicio, & restituit tenementum ipsi B. post impetrationem ipsius C. vel ante, si C. conveniat cum A. & non B., A. non potest restituere, sed B., si tamē cōveniat B., B. nullam fecit disseysinam C. Oportet ergo quòd ambo cōveniāt simul, A. qui fecit disseysinā, & B. qui potest restituere. A. nihil potest dicere quare

be disseysed, whereby it is presumed that has lost both possessions, the natural and the civil. Likewise in the same manner the willingness, if he has wished from the commencement or after a time, will have remitted the injury, and as it were quitclaimed the tenement. Likewise a compromise impedes restitution, as if he has remitted part of the tenement, and received back a part in the name of a concord, which may be conceded to him of grace, and for the good of peace and not of right, because of those things which are presumed against the peace of the lord the king, there shall be no compromise nor concord, but a judgment, according to which the claimant withdraws, or the disseysor himself acknowledges the disseysine. Likewise a confirmation or consent impede restitution, as if the person disseysed has confirmed to the disseysor the thing disseysed, because a gratuitous confirmation removes the injury. Consent, as if the disseysor has made a donation, and the person disseysed has consented to the donation, and has ratified it, whether from the commencement or after a time. Likewise one's own usurpation of one's own property after a disseysine without a judgment, but after a time, as if a person has been disseysed and has been negligent in suing out a writ or in prosecuting the suit, or in both, he cannot usurp possession of his own property without a judgment (as above), but he may receive it, if it be offered to him gratuitously, sometimes indeed, but not always, for example: A. disseyses B. and C. disseyses A., or perhaps A. gives the tenement to C., B. sues out a writ against A., A. is afraid on account of the disseysine and an assise, he ejects C. without a judgment, and restores the tenement to B. himself after or before C. has sued out a writ, if C. comes to terms with A. and not B., A. cannot restore, but B.; if however B. comes to terms, B. causes no disseysine to C. It is incumbent therefore that both should come to terms, as well A. who caused the disseysine, and B. who can restore. A. can say nothing wherefore the

assisa remaneat. B. si dicat cōtra assisa quòd ipse sit dñs ꝑprietatis, & quòd A. qui eum injustè disseysivit illam ei gratis obtulit, & illā sic oblatam recepit, replicare possit idē C. quòd ex quo idem A. injustè ejecit ipsum & sine judicio, & ita quòd ipsi[1] de tali disseysina impetravit cōtra ipsum A. & ita quòd præceptum esset vic. q tenemētū illud faceret esse in pace usq; ad advētū justiciariorū, non poterit idem A. illud ad aliū transferre sine ꝓjudicio ipsius C., & unde si idem A. illud ei postmodū gratis offerret, illud recipere non deberet, quia hoc esset in præjudiciū ipsius C. licet in nullum præjudicium ipsius A. Et perinde erit versus ipsum C. ac si seysinam suā sine judicio usurpasset versus ipsum A. Item difficultas judicii impedit restitutionē, & quo casu partes induci poterunt ad concordiā, ut si nullo modo terminari possit negotium. Secus tamē est si aliquo modo, quāvis cū difficultate. Itē res judicata, maximè si justū intervenerit judiciū. Itē intrusio impedit restitutionē, dū tamen nō currat tēpus ꝑ negligentiā, hoc est si incontinenti ejiciatur. Itē exceptio finis facti impedit restitutionē in suo casu. Itē sunt alia plura, de quibus ad præsens non recolitur, sed ista sufficiunt exempli causa.

1. f. 215 b. Sunt quædam exceptiones, quæ sunt quasi extra seysinam et non tangunt, sed perimunt breve quandoque, et quandoque differunt assisam.

Cap. XXXIV.

Item sunt quædam exceptiones, quæ assisam omnino non perimunt sed breve & non actionem, licet ad tempus assisam differant, sicut exceptio contra jurisdictionem. Item exceptio quæ datur contra breve.

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[1] "ipse," MS. Rawl. C. 160.

assise should be stayed. B., if he says against the assise that he himself is the lord of the property, and that A. who unjustly disseysed him offered it to him gratuitously, and he received it when so offered to him, the said C. may reply that since A. has unjustly ejected him, and without a judgment, and so that he sued out a writ against A. on account of that disseysine, and so that a precept was issued to the viscount that he should cause that tenement to be in peace until the coming of our justiciaries, the said A. could not transfer to another that tenement without prejudice to C., and hence if the said A. offered it to him afterwards gratuitously, he ought not to have received it, for this would be to the prejudice of the said C., although not to the prejudice of the said A. And it will be of the same effect against C. as if he had usurped his own seysine without a judgment against A. Likewise the difficulty of a judgment impedes restitution, and in which case the parties may be induced to come to a concord, as if the business could not be in any way terminated. It would be otherwise, however, if it could be in some way terminated, although with difficulty. Likewise a matter which has been adjudicated, particularly if a just judgment has intervened thereon. Likewise an intrusion impedes restitution, provided, however, time does not run from negligence, that is, if he be ejected forthwith. Likewise the exception of a fine having been made impedes restitution in its own case. Likewise there are several other matters, concerning which it is not easy to recollect at the present moment, but these are sufficient for example's sake.

1. f. 215 b. There are some exceptions, which are outside the seysine, and do not affect it, but perempt the writ sometimes, and sometimes defer the assise.

Chapter XXXIV.

Likewise there are some exceptions, which do not perempt the assise altogether but the writ and not the action, although for a time they defer the assise as an exception against the jurisdiction. Likewise an exception which is given against the writ.

2. De exceptionibus dilatoriis, quæ sunt contra assisam.

Item exceptio quæ datur contra personē querentis. Item exceptio quæ cōpetit ex ꝑsona tenentis. Item exceptio quæ competit ex loco & tempore. Item exceptio quæ competit contra juratores, quia sunt minus sufficientes & essoniabiles sive recusabiles, vel licet sint competentes, non tamen sint præsentes. Et cùm omnes istæ exceptiones (sive sint peremptoriæ sive dilatoriæ) sunt quasi extra assisam, vel præter, & ideò nō in modum assisæ, sed in modum juratæ terminanť, quasi ꝑ consensum partiū. Cùm unus dicat ita esse & alius contrarium, quasi extra assisam, & petat quilibet eorum ꝙ sua veritas inquiratur. Et ideo conventionem non recipiunt, quia si qua[1] partium venire vellet cōtra dicta juratorū, ita diceret ꝑbationem suam esse falsam, cùm veredictum juratorū in hoc casu non sit assisa sed ꝑbatio exceptionis, quia qui excipit ꝑbare debet exceptionem. Et eodem modo qui replicat contra exceptionem, ꝑbare debet replicationem.

3. Qualiter et quibus modis cadit assisa in juratam. Britton, ii. ch. xx. Fleta, 244.

Ut autem sciatur quādo convictio habet locū, quando non, videndū erit utrum assisa capiatur in modum assisæ, vel in modum juratæ. In modum assisæ sic, ut si fundata intētione querentis, tenens se statim ponat in assisam sine aliqua exceptione, & respondeat intentioni querentis, quòd non disseysivit eum, & inde ponit se super assisam, & si juratores dicant simpliciter quòd non disseysivit ipsum, vel quòd disseysivit sine aliqua causa adjecta, si falsum dixerint sive in principali & in iis quæ tangunt actionem & assisam, sive in iis quę tangunt exceptiones, nisi justus error

[1] "quæ," MS. Rawl. C. 160.

Likewise an exception which is given against the person of the plaintiff. Likewise an exception which is allowable as to the person of the defendant. Likewise an exception which is allowable as to the place and time. Likewise an exception which is allowable against the jurors, because they are less sufficient and are essoinable or refusable, and although they may be competent, they are not present. And since all these exceptions (whether they are peremptory or dilatory) are as it were outside the assise or beside it, they are on that account determinable not in the manner of an assise, but in the manner of a jury, as if with the consent of the parties. When one says that it is so, and another says the contrary, as it were outside the assise, and each of them petitions that his truth may be inquired into. And on that account they do not admit of a convention, because if any of the parties would wish to impugn the sayings of the jurors, he would say that his evidence was false, since the verdict of the jurors in this case is not an assise, but the proof of an exception, because he who excepts ought to prove his exception, and in the same way he who makes a replication to the exception, ought to prove his replication.

2. Of dilatory exceptions which are against the assise.

But that it may be known when a conviction has place and when not, we must see whether the assise is held in the manner of an assise or of a jury. In the manner of an assise in this way, as if upon the statement of the plaintiff having been made, the defendant at once puts himself upon an assise without taking any exception, and responds to the statement of the plaintiff, that he has not disseysed him, and thereupon puts himself upon an assise, and if the jurors say simply that he has not disseysed him, or that he has disseysed without any cause being added, if they have said false either as regards the principal act and in those matters which touch the action and the assise, or in those which touch the exceptions, unless a just and probable error may excuse

3. In what way and by what means an assise falls into a jury.

& ꝑbabilis eos excusaverit, convinci poterunt in iis quæ tangunt assisam: ut si dicant quòd disseysivit talem injustè, cùm non disseysiverit, vel e contrariò, vel si dicant quòd tenens disseysivit querentem de libero tenemento, cùm teneret in villenagio vel e contrariò & hujusmodi. Vel si dicat aliquid, quod tangat exceptionem & nō actionem nec assisam, sed non simpliciter sed cum causæ adjectione, ita scilicet, quòd querens disseysiri non poterit de libero tenemento, quia villanus est, & tenuerit in villenagio, cùm liber sit & liberê tenuerit, vel e contrariò: si ille querens postmodum possit docere contrarium, juratores convicti sunt de perjurio, quia assisa capta est in modum assisę & non juratę. Si autem proposita querela querentis, respondeat tenens intentioni, q̄ querens disseysiri non potuit de libero tenemento quia villanus est, & tenuit
f. 216. in villenagio, & querens dicat simpliciter quòd non, nihil replicandò, cùm per negationem fiat res dubia: oportet quòd tenens probet exceptionem per parentes, quos statim habeat ad manum (si possit) vel ad diem, vel per assisam. Et quo casu, sive per parentes sive per assisam ꝑbaverit, cùm inde se posuerit in assisam in modum juratę capiendam, sive juratores dicant pro uña parte sive pro alia, non sunt convincendi, quia hic est potiùs probatio exceptionis per juratam, quàm captio assisę per assisam. Nec etiam sive verum dicant sive falsum, non propter hoc prejudicabitur querenti in causa status, & sic in hoc casu semper incumbit probatio tenenti. Sed esto quòd querens sic respondeat exceptioni, per quam dicitur quòd ipse villanus sit, & ipse replicando dicat quòd sit liber, adhuc

them, they may be convicted in those matters which touch the assise: as if they should say that he has disseysed the said person unjustly when he has not disseysed him, or the contrary; or if they should say that the defendant has disseysed the plaintiff from a freehold, when he held in villenage, or the contrary, or such like. Or if he says anything, which touches the exception and not the action or the assise, but not simply, but with the addition of a cause, thus, to wit, that the plaintiff cannot be disseysed from a freehold, because he is a villein, and has held in villenage, when he is free and has held freely, or the contrary; if the same plaintiff can afterwards show the contrary, they are convicted of perjury, because the assise has been held in the manner of an assise, and not of a jury. But if upon the claim of the plaintiff having been set forth, the defendant should respond to the statement, that the plaintiff could not be disseysed from a freehold, because he is a villein and held in villenage, and the plaintiff f. 216.
says simply that it is not so, without any replication, since by the denial the matter is put in doubt, it is incumbent that the defendant prove his exception by his relatives, whom he may have at hand (if he can), either on a day fixed or by an assise. And in which case, whether he has proved by his relatives or by an assise, since he has put himself on an assise to be held after the manner of a jury, whether the jurors find in favour of one party or of the other, they are not to be convicted, for this is rather the proof of an exception by a jury, than the holding of an assise by an assise. Nor even whether they speak the truth or a falsehood, the plaintiff will not thereby suffer prejudice in a cause of *status*, and so in this case the proof is incumbent on the defendant. But let it be that the claimant so responds to the exception, whereby it is said that he is a villein, and by way of replication says that he is a free person, the proof is still incumbent on the defendant,

incumbit probatio tenenti, quam quidem si aliquo modo probaverit, probet querens contrarium (si possit) per probationem validiorem replicando. Si autem excipiens non probaverit, non erit necesse quòd querens probet contrarium replicando, quasi exceptione nulla. Si autem non sunt parentes, qui ex aliqua parte producantur, de necessitate recurrendum erit ad assisam, ut in modum juratę terminetur negotium, quia hinc inde erit probatio & non assisa. Probat enim tenens exceptionem per juratam, in quam de necessitate consentire oportet propter defectum alterius probationis, quia si non habeat parentes, de necessitate recurritur ad juratam, alioquin nulla erit exceptio, quasi deficiente probatione. Eodem modo dici poterit de replicatione querentis. Sed esto quòd querens parentes non habeat, quos producat, & cùm tenens probare voluerit exceptionem per juratam, & querens hoc recusaverit, sequitur quòd querenti denegabitur actio & assisa. Si autem tenens hoc recusaverit, procedet assisa in modum assisę, quasi exceptione nulla. Si autem fundata intentione querentis excipiat tenens de villenagio, & probationem habeat ad manum, parentes scilicet vel juratam, poterit querens replicare de privilegio (si fuerit dominus qui petat) ut suprà de exceptionibus villenagii pleniùs. Sed hæc vera sunt, habita ratione ut supra, utrum videlicet opposita fuerit à domino vel extraneo non domino, & tunc utrum ille, cui opponitur, fuerit in potestate domini sui vel extra.

4. Si ille, qui tenuerit per legem

Item cadit assisa in juratam alio modo, ut si querens sic fundaverit intentionem & dicat, quòd duxit uxorem habentem hereditatem vel maritagium, & post

which if he shall have proved in any manner, let the plaintiff prove the contrary (if he can) by a stronger proof in replication. But if the exceptor has not proved [his exception], it will not be necessary that the defendant should prove the contrary in replication, the exception being as it were null. But if there be no relatives, who can be produced in any part, recourse must be had of necessity to an assise, that the business may be determined in the manner of a jury, because there will be evidence on both sides, and not an assise. For the defendant proves his exception by a jury, to which he ought of necessity to consent, on account of the defect of any other proof; because if he have not relatives, recourse is of necessity had to a jury, otherwise the exception would be null, the proof having as it were failed. In the same manner it may be said concerning the replication of the plaintiff. But let it be that the plaintiff has no relatives, whom he can produce, and when the defendant wishes to prove his exception by a jury, and the plaintiff has refused this, it follows that both an action and an assise will be denied to the claimant. But if the defendant has refused this, the assise will proceed in the manner of an assise, the exception being as it were null. But if upon the claimant having made his statement the defendant should except on the ground of villenage, and should have his proof at hand, his relatives, to wit, or a jury, the plaintiff may make a replication of privilege (if it be the lord who claims), as above concerning the exceptions of villenage it has been explained more fully. But these things are true, regard being had as above, whether, to wit, the exception has been raised by the lord or by a stranger who is not the lord, and then whether he against whom the exception is raised, has been in the possession of his lord, or beyond it.

4. If he who is tenant by the law

Likewise the assise falls into a jury in another way, as if the plaintiff has thus founded his statement, and says, that he married a wife having an inheritance or a

Angliæ, dicat se esse disseysitum.

mortem uxoris suæ fuit in seysina per tantum tempus, donec talis eum injustè disseysiverit, & ita fuit in seysina per legem Angliæ, quia ipse & uxor ejus pueros habuerunt in communi. Ad quòd si tenens contra ipsum exceperit quòd nullum omnino habuerunt, vel si habuerunt, mortuus fuit in utero, vel si natus fuit, monstrum fuit & non puer, vel si puer fuit & vivus, nunquam auditus fuit clamare inter quatuor parietes. Si autem querens dicat replicando contrarium, in modum juratę inquiratur veritas per assisam, & sic terminabitur negotium. Si autem dicant juratores, quòd benè viderunt eum seysitum & postea ejectum per tenentem, sed de aliquo puero nihil sciunt, quia mater obiit in pariēdo extra comitatū in remotis, et ꝙa eorū veredictū insufficiēs est, & quia ipsi ignorare possunt ea quæ fiunt in remotis, recurrēdū erit ad comitatum & ad vicinetum ubi mater obiit, & ibi facta inquisitione de veritate, terminetur negotium. Item excipere poterit tenens contra querentē, quòd si liberos habuerit postea convicti fuerunt ad bastardos, quòd si querens negaverit, hoc per assisam in modum juratæ declarabitur. Item esto quòd sic dicat, quòd pueri bastardi sunt & hoc paratus est docere ubi, & quando, &c., tūc aut dicit quòd ita bastardi sunt, aut quòd nati fuerunt ante matrimonium contractum, & alius dicat quòd post, & uterq; se inde posuerit in juratam, per juratam poterit negotium terminari (secundùm quosdam). Si autem excipiat quòd querens matrem nunquam desponsavit, & querens replicando dicat quòd sic, remanebit assisa, quousque in foro debito, i. ecclesiastico, constiterit de veritate.

Britton, *ib.* § 11.

Fleta, 249. § 10.

f. 216 b.

5. Quod assisa competit prima facie

Vertitur etiam assisa quandoque in juratam propter transgressionem, ut si quis contra voluntatem domini uti velit in alieno, vel contra voluntatem participum

maritage, and after the death of his wife he has been in seysine by the law of England, because he and his wife have had children in common. To which if the defendant should raise an exception against him, that they never had a child at all, or if they had, it died in the womb, or if it was born, it was a monster, not a boy, or if it was a boy and alive, it was never heard to cry within four walls. But if the plaintiff shall say the contrary in his replication, let the truth be inquired into after the manner of a jury by an assise, and so the business shall be terminated. But if the jurors should say, that they have well seen him in seysine and afterwards ejected by the defendant, but they know nothing about a boy, because the mother died in childbirth out of the county in remote parts, and because their verdict is insufficient, and because they may be ignorant of those things which are done in remote parts, recourse must be had to the county and to the neighbourhood where the mother died, and upon an inquest having been there held concerning the truth, let the business be determined. Likewise the defendant may except against the plaintiff, that if he had children, they were afterwards proved to be bastards; but if the plaintiff has denied this, it shall be declared by an assise held after the manner of a jury. Likewise let it be that he says thus, that the boys are bastards, and that they were born before matrimony was contracted, and another says that they were born afterwards, and each puts himself upon a jury, the business may be determined by a jury (according to some). But if he should except that the plaintiff never espoused the mother, and the plaintiff in his replication should assert the affirmative, the assise will be suspended until it has been established concerning the truth by the due tribunal, that is by the ecclesiastical court.

of England, says that he has been disseysed.

f. 216 b.

An assise is sometimes converted into a jury on account of a trespass, as if a person against the will of the lord wishes to have the use of another's land, or

5. That an assise is allowable

et ab initio, donec constiterit, quo animo quis quidfecerit, quia si de animo constiterit, statim aut assisa, vel transgressio per confessionem ejus, qui convenitur. Britton, *ib.* § 13. Fleta, 249, § 12.

uti voluerit in communi, & de communi facere proprium vel excessum: proprium, ut si sibi appropriare voluerit aliquam partem quæ communis est, vel utendo excessum facere, & ita sibi usurpare quod alienum est vel commune sibi & aliis, facit disseysinam, & similiter transgressionem, quia omnis disseysina est transgressio, sed non omnis transgressio est disseysina. Et si eo animo forte ingrediatur fundum alienum, non quòd sibi usurpet tenementum vel jura, non facit disseysinam sed transgressionem. Sed quoniam incertum est quo animo hoc faciat, ideò querens sibi perquirat per assisam, & quo casu, querendum erit à judice quo animo hoc fecerit, utrum eo quòd jus habeat in re vel non habeat, ut si forte ductus errore probabili vel ignorantia sed non crassa, ut si omnes de patria sciverint rem ad ipsum non pertinere, & ipse solus ignoraverit, non excusatur. Si autem ignorantia justa fuerit & probabilis error, & ita ingrediatur fundum alienum cùm suum esse crediderit, & clam vel palam arbores succiderit, vel herbam falcaverit, vel aliud genus investituræ & non nomine seysinæ asportaverit, sed p errorē vel ignorantiā, excusaẗ à disseysina, ꝺa ibi est potius trāsgressio quā disseysina; quam quidem si cognoverit, emendet: & si dedixerit, vertitur assisa in juratam ad inquirendum de transgressione, & per hoc stet vel cadat. Idem erit si teneat in communi, & hoc maxime, nisi ita fecerit sæpius & de consuetudine. Frequentia enim mutat transgressionem in disseysinam; ut si semper transgressionem faciat, & respondeat ad assisam, quòd nihil clamet in tenemento om-

against the will of the coparceners, wishes to have the use of common land, and to make of common land his own or an excess; his own, as if he has wished to appropriate to himself some part of it, which is common, or in using it to commit an excess, and so to usurp to himself what is another's or is common to himself and others, he causes a disseysine, and in like manner a trespass, because every disseysine is a trespass, but every trespass is not a disseysine. And if he has by chance entered upon another's land with such an intention, and not that he should usurp to himself the tenement or its rights, he does not commit a disseysine, but a trespass. But since it is uncertain with what intention he does this, therefore let the plaintiff ascertain it for himself by an assise, and in which case, the judge must inquire with what intention he has done this, whether with an intention that he has a vested right in the thing or not, as if by chance led by a probable error or ignorance not of a crass character; as if all the neighbourhood knew that the thing did not belong to him, and he alone was ignorant, this would be no excuse to him. But if his ignorance has been just and his error probable, and so he has entered upon another's land when he believed it to be his own, and has either secretly or openly felled trees, or mowed the grass, or has carried away some other kind of vesture, and not in the name of seysine, but through error or ignorance, he is excused of disseysine, because there is there rather a trespass than a disseysine; for which, if he has acknowledged it, let him make amends; and if he has denied it, the assise is converted into a jury to make inquest concerning the trespass, and thereby let him stand or fall. The same thing will take place, if he hold in common, and this chiefly unless he has done it repeatedly and habitually. For frequency changes a trespass into a disseysine, as, if he should always make a trespass, and respond to the assise, that he claims nothing in the tenement at all, or

at first sight and from the commencement, until it is established with what intention a person has done anything, because if the intention be established it is forthwith an assise or a trespass by the confession of him who is convened.

ninò vel in re communi per se, ut per hoc pœnam disseysinæ possit evadere, non audietur, sed sustinebit pœnam disseysinæ & redisseysinæ. Idem erit, si in delicto captus fuerit, vel alius quem advocaverit vadium dare noluerit, per juratam aggravetur pœna transgressionis, si hoc fuerit per juratam declaratum. Si autem dicat se jus habere[1] cum nullum habeat, vel dicat suam propriam cùm sit communis, statim procedat assisa in modum assisæ, & per assisam terminabitur negotium. Et quo casu, si res fuerit communis, locum habere poterit communi dividendo judicium. Et quid si talis in alieno ita jus sibi usurpaverit? vel prosternendo arbores vel succidendo, vel lapides finales
f. 217. amovendo, ut prædictum est. Inprimis ante assisam capienda sunt vadia (si fieri possit), & ita emendabitur transgressio per captionem vadiorum, & si se devadiari non permiserit, recurrendum est ad breve de nova disseysina, & cadit assisa in juratam, & duplicabitur pœna transgressionis, vel donec sciatur utrum quis
Britton, 11, ch. xx. § 15. clamaverit vel non. Et eodem modo si quis vastum fecerit vel distructionem[2] in tenemento quod tenet ad vitam suam, in eo quòd modum excedit & rationem, cùm tantum concedatur ei rationabile estoverium & non vastum, facit transgressionem. Et si talis impediatur per aliquem, cujus interfuerit, sicut parens vel amicus, ille tenens[3] assisam non habebit. Intentio enim talis liberabit à disseysina, quia in eo quòd tenens abutitur malè utendo, & debitum usum in[4] modum debitum excedendo, non poterit dicere quòd disseysitus est, quia tantum rationabilis usus ei conceditur. Et si per aliquod tempus fortè abusus fuerit ultra

[1] "jus habere in re," MS. Rawl. C. 160.
[2] "destructionem," *id.*
[3] "ille talis tenens," MS. Rawl. C. 160.
[4] "et modum," *id.*

in the common thing by himself, so that he may thereby be able to escape the penalty of a disseysine, he shall not be listened to, but shall sustain the penalty of a disseysine and a redisseysine. It will be the same, if he has been taken in the offence, or another person whom he has avowed has refused to give security, let the penalty of trespass be enhanced by the jury, if this has been declared by a jury. But if he says that he has the right, when he has none, or says that the land is his own property, when it is common, let the assise forthwith proceed in the manner of an assise, and let the affair be determined by the assise. And in which case, if the thing has been common, a judgment for dividing the common may take place. And what if the said person has usurped to himself a right in another person's ground in this manner, either by felling trees or cutting off branches, or removing boundary stones, as aforesaid? In the first place before the assise let sureties be required (if it be possible), and so the trespass will be compensated by the taking of sureties; and if he does not permit himself to be bailed, recourse must be had to a writ of novel disseysine, and the assise falls into a jury, and the penalty of the trespass is doubled, or until it is known whether he has claimed [the tenement] or not. And in the same manner, if a person has committed waste or destruction in a tenement which he holds for his life, in what exceeds moderation and reason, when there is only allowed to him a reasonable estovery and not waste, he commits a trespass. And if such a person be impeded by some one, who has an interest in it, as a relative or a friend, the tenant shall not have an assise. For such a statement will acquit of disseysine, because inasmuch as the tenant abuses [his right] by using the thing ill, and by exceeding the due use in the due manner, he cannot say that he is disseysed, because the reasonable use of the thing is alone allowed to him. And if by chance he has abused the thing immoderately for some time, such

f. 217.

modum, talis seysina nulla erit, quia non est seysina quæ trahit ad abusum, sed præsumptio injuriosa. Et ideo causa & intentio liberat impedientem, sed hoc per assisam in modum juratæ captam declarari oportebit, scilicet utrum sit ibi vastum vel rationabile estoverium. Item cadit quandoque assisa in perambulationem, si fuerit incertum, in quo comitatu vel in cujus fundo tenementum illud de quo agitur extiterit.

6. Item vertitur assisa quandoque in juratam propter transgressionem districtionis, fieri enim poterit disseysina sub colore districtionis. Britton, *ib.* § 15. Fleta, 250, § 15.

Vertitur etiam assisa aliquando in juratam propter transgressionem districtionis, districtio enim aliquando facit disseysinam, & aliquando transgressionem majorem vel minorem, & secundùm hoc terminabitur negotium in modum assisæ, si ibi fuerit disseysina, vel vertetur assisa in juratam, si ibi fuerit transgressio major vel minor. Et unde cùm assisa fuerit impetrata super injuria districtionis, si non possit valere ut assisa ad terminandam disseysinam, valeat tamen ut jurata ad terminandam transgressionem. Transgressio enim poterit esse major vel minor; major, ut si non sit omnino disseysina, tamen non multum differens à disseysina, quasi ei proxima & vicina, ut licet per districtionem non impediatur quis omnino uti, tamen erit transgressio vicina disseysinæ, si ad commodum uti non possit, propter transgressionem[1] minus transgressivam, vel excessivam ultra modum & mensuram debitam. Item poterit esse transgressio simplex, duplex, triplex, quadruplex, & multiplex: simplex, sed gravis, ut si fiat districtio ubi nulla causa est distringendi, vel quòd non pertineat ad distringentem, & erit disseysina, ubi nulla subfuit causa distringendi. Item si subsit causa, tamen si fiat ordine non observato, adhuc simplex est, ut si quis distringat tenentem suum

[1] "districtionem." MS. Rawl. C. 160.

a seysine will be null, for it is not seysine which leads to abuse, but an injurious presumption. And therefore the cause and statement acquit the party who impedes him, but this it will be incumbent to have declared by an assise held in the manner of a jury, to wit, whether there be in that case waste or a reasonable estovery. Likewise an assise falls sometimes into a perambulation, if it be uncertain in what county or on whose ground the tenement which is the subject of the action is situated.

6. Likewise an assise is sometimes converted into a jury on account of the trespass of a distress, for a disseysine may be effected under colour of a distress.

An assise also is converted into a jury sometimes on account of a trespass in a distress, for a distress sometimes effects a disseysine, and sometimes a greater or less trespass, and accordingly the affair will be determined in the manner of an assise, if there has been a disseysine, or the assise will be converted into a jury, if there has been there a greater or less trespass. And hence when an assise has been sued out upon the tort of a distress, if it cannot avail as anassise to determine the disseysine, it can however avail as a jury to determine the trespass. For the trespass may be greater or less: greater, as if there be not altogether a disseysine, nevertheless there is something not much different from a disseysine, as it were the next thing to it and bordering on it, that although a person may not be altogether impeded by the distress from using the thing, nevertheless there will be a trespass bordering on a disseysine, if he cannot use it advantageously, on account of a distress less transgressive, or excessive beyond manner and due measure. Likewise a trespass may be simple, double, triple, quadruple, and multiple; simple but grave, as of a distress is levied, where there is no reason for making a distress, or because it did not appertain to the party distraining, and there will be a disseysine if there has been no substantial cause for the distress. Likewise if there be a substantial cause, nevertheless if it be without observing order, it is still simple, as if a person dis-

per res suas dominicas, cùm habeat villenagium. Item si distringat tenentem tenentis sui, licet feodum suum, cùm tenens suus (qui medius est) sufficiens habeat dominicum. Item ordine non servato, si fiat districtio per immobilia, cùm ibi sint mobilia vel se non moventia. Item ordine non observato, si fiat districtio per immobilia & se non moventia, cùm sint ibi mobilia & se moventia. Item ordine non servato, si distringat per mobilia & se moventia intrinseca, cùm sint quæ sufficiunt ad districtionem forinseca. Item ordine non observato, si fiat districtio per oves, & sunt per quæ ad minùs damnum distringantur animalia otiosa. Item
f. 217 b. ordine non observato, si fiat districtio per boves, ut culturam auferant vel impediant, cùm sint alię res & animalia otiosa, quæ sufficiant ad districtionem. Et unde talis districtio potiùs dici debet disseysina quàm transgressio, & ista injuria simplex est. Item si subsit causa & observetur ordo, adhuc potest esse injuriosa, si fuerit nimia, & districtio modum[1] excedat in qualibet specie. Non enim debet fieri magna districtio pro minimo delicto, vel pro minimo servitio, aggravari tamen poterit, ut prima teneatur & plura
Hor. Sat. L. 1. sat. 1. L. 106. capiantur: cùm sit modus in rebus, sunt certi deniquè fines, quos ultraque citraque nequit consistere rectum, & hoc similiter simplex. Item etsi omnia fiant cum ordine, & mensura, poterit esse transgressio in districtione: ut si cùm capta fuerint averia pro districtione & adducta extra comitaī, ne deliberentur per vadium & plegium, nisi hoc factum fuerit ex

[1] "modum," omitted MS. Rawl. C. 160.

trains his tenant by [seizing] his demesne things, when he has a villenage. Likewise if he distrains the tenant of his tenant, although the fee is his own, when his tenant (who is a middle-man) has a sufficient demesne. Likewise without order having been observed, if a distress be levied on immovables, when there are there movables or things not moving themselves. Likewise without order being observed, when a distress is levied upon immovables and things not moving themselves, when there are movables and things moving themselves. Likewise without order having been observed, when he distrains upon movables and things movable, but within the premises, when there are things which suffice for the distress, which are outside the premises. Likewise without order being observed, if a distress be levied upon the sheep, and there are animals of pleasure upon which a distress may be levied with less damage to the owner. Likewise without observing order, if the distress be f. 217 b. levied upon the oxen, so as to take away or impede the means of the cultivation, when there are other things and animals of pleasure which are sufficient for the distress. And hence such a distress may rather be called a disseysine than a trespass, and this injury is single. Likewise if there be a substantial cause, and order be observed, it may still be injurious, if it be too much and the distress exceeds moderation in any species. For there ought not to be made a great distress for a very slight offence, or for a very slight service, it may however be aggravated, so that the first be retained and more be taken: since there is moderation in things, there are certain settled limits, on both sides of which right cannot be, and this is similarly single. Likewise although all things are done with order and with measure, there may be trespass in the distress, as if the cattle have been seized for the distress and driven out of the county, in order that they should not be released for bail and surety, unless this has been done for a just reason, as if the

justa causa, ut si caput baroniæ fuerit extra comitaŧ & curiam domini capitalis. Item si omnia benè conveniant, & districtio sit mensurabilis & per modum, sive subfuerit causa distringendi sive non, si averia capta per vadium & plegium vetentur, vetitum illud non solum erit querenti injuriosum, imò domino regi, cùm sit contra pacem suam, & quia ubi deficiunt vadia & plegia deficit pax, & sic repetitis omnibus supradictis, secundùm quòd in omnibus sit præsumptum vel in parte, aut erit transgressio simplex, vel duplex, vel ulteriùs, & secundùm quod fuerit major vel minor, transgressio erit vicina disseysinæ, vel non erit. Et qualiter fieri debent districtiones pro servitiis, supra pleniùs de districtionibus.

Supra De Corona, ch. xxxvii. vol. ii. p. 348.

7. Qualiter fieri potest disseysina sub specie districtionis.

Fieri autem poterit disseysina sub specie districtionis tali modo, ut si talis fiat districtio per boves, per carucas, & non per modum & mensuram, quòd cultura omninò depereat. Sed cùm fieri possit disseysina, si cultura per districtionem depereat, quare non fit disseysina eodem modo, fit[1] depereat melioratio? Quia ubi deficit melioratio, perit cultura in parte vel in toto. Videtur igitur quòd sit disseysina, si quis per captionem averiorum meorum, cùm non subsit causa distringendi, vel cùm sit, modum excedat, vel per excogitatam malitiam ordinem non observaverit, & carectas ceperit dispositas ad meliorationem agrorum, & ita quòd deficiat melioratio in marla vel in stercoratione. Non video quare non. Item fit disseysina per districtionem, non solum per prædicta, verum etiam si sub specie districtionis non permittit quis tenentem suum blada metere, vel coadjuvare ad commodum suum in feodo ipsius qui distringit. Item si non permittit ea vendere, alienare, vel extendere: dum tamen tan-

[1] "si depereat," MS. Rawl. C. 160.

head place of the barony is outside of the county and the court of the chief lord. Likewise if all things well agree, and the distress be measurable and modified, whether there has been a substantial reason for the distress or not, if the cattle seized are refused to be released for bail and surety, that refusal will not only be injurious to the complainant, but to the king himself, since it is contrary to the peace, and where bail and surety fail, peace fails; and so if all the things above said be repeated, according as it has been presumed in all or only in part, it will be either a single trespass, or a double trespass or further, and according as it is greater or less, the trespass will be bordering upon a disseysine or not. And in what way distresses ought to be levied for services, has been discussed more fully above on the subject of distresses.

7. In what way a disseysine may be made under the form of a distress.

But a disseysine may be effected under the form of a distress in this manner, as if the distress be levied on the oxen and on the ploughs, and not by mode and measure, so that the cultivation altogether perishes. But since a disseysine can be effected, if the cultivation altogether perishes, wherefore is there not a disseysine in the same way, if the amelioration of the land perishes. For where the amelioration perishes, the cultivation perishes in part or in entirety. It seems therefore that there is a disseysine, if any one by seizing my cattle, when there is no cause for a distress, or when there is, exceeds moderation, or from malice prepense does not observe order, and seizes my carts when arranged for the amelioration of the fields, so that the amelioration by marling them or by manuring them fails. I do not see why not. Likewise a disseysine is effected by a distress, not only through the aforesaid acts, but also if under the form of a distress a person does not allow his tenant to reap his wheat, or to gather it together for his own advantage upon the fee of him who makes the distress. Likewise if he does not permit him to sell, alienate, or extend; whilst neverthe-

tum retineat tenens, quod sufficiat ad districtionem. Facit etiam disseysinam dominus distringens sub specie districtionis, ut si blada nondum à solo separata propria autoritate messuerit & asportaverit, sive ipse hoc fecerit, sive ballivi sub nomine suo, quorum factum advocaverit. Et eodem modo cùm blada sint à solo separata, & maximè nisi hoc de voluntate tenentis processerit. Fit autem disseysina sub specie districtionis, ut si quis per judicium curiæ aliquod tenementum sui tenentis in manum suam ex suo decreto ceperit, & alium inde statim feoffaverit, ita quòd non sit ei potestas restituendi cùm voluerit, oblato ei servitio
f. 218. cum arreragiis. Item fit disseysina sub specie districtionis, ut si quis tenementum tenentis sui ita ceperit in manum suam, ut prædictum est, & illud restituere contradixerit tenenti suo post tempus reverso, cùm paratus sit satisfacere ei de servitio & de arreragiis de tempore præterito. Item terminatur quandoquè assisa & querela disseysinæ sine assisa & jurata per exceptionem rei judicatæ, cùm assisa arramata fuerit versus aliquem, qui dicat quòd nullam fecerit injuriam, eo quòd ipse per judicium recuperaverit tenementum illud de quo queritur, & tunc aut statim ponat se inde in assisam, aut vocat ad warrantum rotulos justiciariorum & eorum judicium. Si autem se ponat in assisam, hoc ei prodesse non debet, sed se ponat super rotulos, quia si juratores dixerint contrarium rotulis vel diversum, ex hoc convinci possunt ad minus de mendacio, & ita capi possit assisa super assisam (quod esse nō debet) super eadem re & de eodem facto. Melius tamen est in omni casu quòd recurratur ad rotulos &

less the tenant retains enough to satisfy the distress. The lord distraining effects a disseysine under the form of a distress, as if he has reaped and carried away of his own authority corn not yet separated from the soil, whether he has done this himself, or bailiffs under his name, whose act he has avowed. And in the same way when the corn has been separated from the soil, and especially unless this has been done with the consent of the tenant. A disseysine is also effected under the form of a distress, as if any one through a judgment of a court has taken into his hand in accordance with its decree a tenement of his tenant, and has forthwith enfeoffed another person with it, so that he has not the power of restoring it, when he wishes, upon the service with the arrears having been tendered to him. Likewise a disseysine takes place under the form of a disseysine, as if a person f. 218.
has taken into his hand the tenement of his tenant in such manner as aforesaid, and has refused to restore it to his tenant upon his return after a certain time, when the latter is prepared to satisfy him for the service and the arrears for the past time. Likewise sometimes an assise and a plaint of disseysine are determined, without an assise and a jury by an exception of a previous judgment, when the assise has been instituted against some one, who says that he has done no injury, inasmuch as he has recovered by a judgment the tenement concerning which the plaint is made, and then he either places himself forthwith upon an assise, or he calls to warrant him the rolls of the justiciaries and their judgments. But if he puts himself upon an assise, this ought not to profit him, but he should put himself upon the rolls, for if the jurors find contrary to the rolls or different from them, they may thereby be convicted of falsehood at the least, and so an assise may be held upon an assise (which ought not to be) upon the same subject and concerning the same act. Nevertheless it is better in every case that recourse should be had to the rolls and to the act of

factum justiciariorum. Item si dicat quòd per judicium curiæ suæ, vocet inde curiam suam ad warrantum.

8. Item cadit in assisam bastardia. Britton, ii. ch. xx. § 12. Fleta, 249, § 11.

Item cadit in assisam novæ disseysinæ bastardia inter fratres, quorum unus eorum priùs se posuit in seysinam post mortem antecessoris sui. Quo casu, refert utrum seysina vacua fuerit vel non vacua, scilicet utrum dominus capitalis primam habuerit seysinam, vel non habuerit. Si autem habuerit primam seysinam, & unus ex duobus qui contendit se esse hæredem super seysinam capitalis domini se posuerit in seysinam & sic non vacuam, bene poterit dominus capitalis illum rejicere statim vel post tempus & impunè, quia per assisam non recuperabit intrusus, quia vacuam seysinam non invenit. Sed capitalis dominus in ea remanebit, donec ei constiterit quis sit hæres. Si autem capitalis dominus primam seysinam non habuerit, sed unus ex duobus qui se fecerit heredem, sive sit heres legitimus sive non legitimus vel bastardus, & in seysina fuerit per aliquod tempus, tunc capitalis dominus eum impunè ejicere non potest; & si de facto ejecerit, & ejectus assisam portaverit, non obstante aliqua exceptione recuperabit. Et unde si dominus capitalis objecerit ei (petenti restitutionem) exceptionem quòd bastardus sit, talis exceptio bastardie (cùm alius sit qui facit se heredem) in ore capitalis domini non jacebit, quia ista exceptio non pertinet ad ipsum, sed ad alium qui se facit heredem, nec etiam ad capitalem dominum, licet alius non sit hæres, si ille intrusus (licet bastardus) per aliquod tempus, quod sufficiat pro titulo, per negligentiam capitalis domini extiterit in seysina, sine judicio ejici non poterit, quia in hoc casu (propter tempus) priùs cognoscendum est de violenta ejectione, quàm de jure eschætæ. Item nec

the justiciaries. Likewise if he should say by the judgment of his own court, let him thereupon call his court to warrant him.

8. Likewise bastardy falls into an assise.

Likewise bastardy falls into an assise of novel disseysine between brothers, where one of them has first put himself into seysine on the death of an ancestor. In which case, it is of importance whether the seysine was vacant or not, to wit, whether the chief lord had the first seysine or not. But if he had the first seysine, and one of the two, who contends that he is the heir, has put himself into seysine upon the seysine of the chief lord, and therefore not upon a vacancy of the seysine, the chief lord may well eject him forthwith or after a time, and with impunity, because the intruder, since he did not find the seysine vacant, shall not recover by an assise. But the chief lord shall remain in it, until it is established clearly for him who is the heir. But if the chief lord has not had the first seysine, but one of the two who has set himself up as the heir whether he be the legitimate heir or not the legitimate heir, or a bastard, and he has been in seysine for some time, then the chief lord cannot eject him with impunity; and if he has in fact ejected him, and the party ejected has brought an assise, he shall recover notwithstanding any exception. And hence if the chief lord has objected to him (when seeking restitution) an exception that he is a bastard, such an exception of bastardy (since there is another who sets himself up as heir) will not lie in the mouth of the chief lord, because that exception does not appertain to him, but to the other who sets himself up to be the heir, nor even to the chief lord, although the other is not the heir, if the intruder (although a bastard) for a certain time, which is sufficient for a title, has through the negligence of the chief lord been in seysine, he cannot be ejected without a judgment, because in his case (on account of the time) cognisance must first be taken of the violent ejection, than of the right of escheat. Likewise it will

valebit ei exceptio, si dicat quòd nunquam fuit in seysina de libero tenemento, quia alius est hæres justior & propinquior, nec ista exceptio jacebit in ore suo, cùm tenementum illud non possit esse suum sed alienum, neque de jure alteri⁹ sibi acquiriť exceptio. Simplex enim debet esse seysina dñi capitalis, cū illā vacuā nō invenerit. Et unde cū talis seysinā suā ꝑ assisam recuperaverit, tunc primò discutiať si sit hæres vel nō, ꝑpinquior vel ꝑpinqu⁹, vel remotus, legitim⁹ vel bastard⁹, & secūdū hęc, cōpetet vero hæredi actio vel capitali dño. Eodē modo fiet, si legitim⁹ ejecerit bastardū.

Cap. XXXV.

f. 218 b.

1. De remedio, quod competit hæredibus disseysitorum. Cum autem disseysitor moriatur vel disseysitus vel uterque, consulitur hæredibus eorum per breve de ingressu, quia cadit assisa omnino ad pœnam et ad restitutionem

Assisa novæ disseysinæ cùm sit triplex, ꝑsonalis scilicet ꝑpter factum, & pœnalis ꝑpter injuriam & delictum, & rei prosecutoria, scilicet ꝙ res restituatur disseysita: in eo quod pœnalis est, & pœna suos tenere debeat autores, non competit hæredibus disseysiti, si disseysitus moriatur, nec datur in hæredes principalis disseysitoris (si moriatur) vivente disseysito, quia pœna extinguitur cum ꝑsona, & hæres non tenetur ex delicto antecessoris. Et eodem modo, si disseysitus moriatur vivente disseysitore, hæredi disseysiti non competit actio de injuria facta antecessori, quia inter ipsum & disseysitorem nulla est obligatio quoad pœnam, licet sit obligatio quoad restitutionem, sed ꝑ aliud breve, scilicet de ingressu. Sed ad hoc ꝙ locū habeat breve de ingressu, videndum est si disseysitus

not avail him, if he should say, that he never was in seysine of the freehold, because another is the more lawful and nearer heir, nor will that exception lie in his mouth, since that tenement cannot be his own and another's, nor does he acquire for himself an exception founded on the right of another. For the seysine of the chief lord ought to be simple, since he has not found it vacant. And hence when such a person has recovered his seysine by an assise, then let it be first discussed whether he is the heir or not, the nearer or a near or a remote heir, legitimate or a bastard; and according to this the true heir or the chief lord will be entitled to bring an action. In the same way it shall be done, if the legitimate heir has ejected a bastard.

Chapter XXXV. f. 218 b.

Since an assise of novel disseysine is threefold, to wit, personal on account of the act, and penal on account of the injury and the offence, and in prosecution of a thing, to wit, that a thing may be restored to the party disseysed of it, inasmuch as it is penal, and a penalty ought to bind the authors of an act, the heirs of the person disseysed, if he dies, are not entitled to it, nor is it allowed against the heirs of the principal disseysor, if he dies, whilst the party disseysed is alive, because the penalty is extinguished with the person, and the heir is not bound by the offence of his ancestor. And in the same way, if the person disseysed dies whilst the disseysor is alive, the heir of the person disseysed is not entitled to an action for an injury done to his ancestor, because there is no obligation between him and the disseysor as regards a penalty, although there is an obligation as regards restitution, but by another writ, to wit, a writ of entry. But in order that a writ of entry should have place, it is to be seen as regards the person disseysed (for

1. Of the remedy, which the heirs of persons disseysed are entitled. But when the disseysor dies, or the person disseysed, or both, their heirs are helped by a writ of entry, because an assise fails altogether as regards a penalty and restitution at the same time, or only as regards re-

simul, vel tantum ad restitutionem, secundum quod assisa incepta fuerit cum defuncto, vel non.

(ad hoc q competit[1] actio hæredi suo in ea parte p qua assisa nove disseysinæ restitutoria est utrum disseysitus) diligens fuerit in impetratione & prosecutione, ad hoc q ppetuari posset actio quantū ad heredes suos vel non, cum vigilantibus jura subveniant &c. Si autem diligens fuerit in impetratione & psecutione, ita q visus terræ factus fuerit & juratores electi, si postmodum moriatur, per talem diligentiam perpetuatur assisa novæ disseysinæ, sive actio in eo q restitutoria est & pœnalis competit hæredibus, & datur contra disseysitores & eorum hæredes, cùm nihil sit quòd negligentiæ antecessoris disseysiti possit vel debeat imputari. In omni casu tenet, sive incepta fuerit in vita antecessoris sive non, & quoad restitutionem, & secundùm quosdam tenet quoad pœnam, si assisa fuerit incepta, & quoad restitutionem, & aliter nō. Sed si ita incepta fuerit assisa in vita antecessoris, q visus terræ factus sit & juratores electi, q ppetuatur assisa quantum ad pœnam disseysitoris, & quantum ad restitutionem, quia hæres succedit in vitiū & sic in pœnā. Si autem in vita antecessoris non sit in tantum pcessum, sed disseysitus satis diligens fuerit ad impetrandum, q ante mortem tamen pducere non potuit ad effectum ppter temporis brevitatem, quia ante mortem facta fuit p tres dies vel quatuor disseysina, ex quo sic fuit impetrando, amittit heres suus assisam mortis antecessoris, quia ex eo, q impetrare voluit, amisit utramq; possessionem civilem & naturalem. Sed hæredi succurritur p breve de ingressu sine clausula. Et hæres disseysitoris non tenebitur nisi tantùm ad restitutionem & non ad pœnam, quia non est ingressus in rem litigiosam. Si autem antecessor disseysitus statim

[1] "competat," MS. Rawl. C. 160.

the purpose of the heir being entitled to an action in that part wherein the assise is for restitution) whether the person disseysed has been diligent in suing out a writ and in prosecuting his suit, in order that the action may be perpetuated as regards his heirs or not, since the laws assist the vigilant, &c. But if he has been diligent in suing out a writ and in prosecuting his suit, so that a view of the land has heen held and the jurors chosen, if he dies afterwards, an assise of novel disseysine is perpetuated by such diligence, and the action in as far as it is for restitution and for a penalty is allowed to the heirs and is given to them against the disseysors and their heirs, since there is nothing which can or ought to be imputed to the negligence of the disseysed ancestor. It binds in all cases, whether it has been commenced in the life of the ancestor or not, and as regards restitution, and according to some it binds as regards the penalty, if the assise has been commenced, and as regards restitution, and otherwise not. But if the assise has been so commenced in the life of the ancestor that a view of the land has been held and the jurors chosen, that the assise is perpetuated as regards the penalty of the disseysor, and as regards the restitution, because the heir succeeds to the defect, and so to the penalty. But if in the lifetime of the ancestor proceedings have not been carried so far, but the person disseysed has been sufficiently diligent as to sue out a writ, which he could not before his death employ with effect from shortness of time, because disseysine was effected three or four days before his death, since he was so engaged in suing out a writ, his heir loses the assise of the death of an ancestor, because from the fact that he wished to sue out a writ, he has lost both the civil and the natural possession. But the heir is assisted by a writ of entry without a clause. And the heir of the disseysor shall not be liable except only for restitution, and not for a penalty, because he has not entered upon a property, which was under litigation. But if the disseysed ances-

stitution, according as an assise has been commenced against the deceased party or not.

post disseysinam prima die, secunda, tertia vel quarta, & recēter & in languore, maximè q sibi pquirere nō potuit nec fuit in pquirēdo, quia ad hæc[1] retinuit civilē possessionem, & recēter ejicere posset disseysitorem suum, cōpetit heredi de seysina talis antecessoris assisa mortis antecessoris ut supra, si autem disseysitus cùm diu viveret & sibi posset pquisivisse si vellet, & nō
f. 219. fecit, vix succurri debeat heredi nisi tātū super pprietate, succurritur tamen quandoq; licet contra jus vel præter. Et esto quòd quis fecerit ab initio disseysinam de aliquo tenemento, quod sit jus uxoris suæ, & disseysitus assisam arramaverit novæ disseysine versus disseysitorem, ita quòd visus terræ factus fuit & juratores electi, vel quòd tali tempore facta sit disseysina, quòd disseysitus ante mortem suam sibi perquirere non possit, si vir obierit & uxor remanserit in eadem seysina post mortem viri sui, & ita obierit seysita, & heres suus post mortem suam ingrediatur seysinam illam, & disseysitus impetraverit breve de ingressu super heredem ratione disseysine, quàm pater heredis fecerit de hereditate matris, si heres respondeat quòd ingressum non habeat per disseysinam quam pater suus fecerat, immo p descensum à matre sua, quæ inde obiit seysita ut de feodo & de jure, & que nullam fecit disseysinam, non valebit illa responsio, quin procedet actio versus eum: quia revera, quamvis illa terra sit hereditas matris sue, ipsa injustum habuit ingressum p disseysinam viri sui, nec heres inde aliquam habet seysinam nisi per disseysinam patris sui, & per injustum ingressum matris sue post disseysinam patris. Et ideo vitium rei adheret heredi, quod contractum

[1] "adhuc," MS. Rawl. C. 160.

tor forthwith after the disseysine, on the first day, the second, the third or fourth, and recently and in sickness, chiefly because he could not apply for a writ, nor was engaged in applying for it, since up to these events he retained the civil possession, and could recently eject his disseysor, the heir is entitled to an assise of the death of an ancestor concerning the seysine of such an ancestor as above; but if the person disseysed, when he has lived a long time and might have applied for a writ if he had wished and has not done so, the heir ought scarcely to be aided except as regards the property, he is however f. 219.
sometimes aided, although contrary to and beyond right. And let it be that a person has effected from the commencement a disseysine from some tenement, which is the right of his wife, and the person disseysed has brought an assise of novel disseysine against the disseysor, so that a view of the land has been taken and the jurors chosen, or that a disseysine has been effected at such a time, that the person disseysed could not apply for a writ before his death, if the husband has died and the wife has remained in the same seysine after the death of her husband, and has died so seysed, and her heir after her death enters upon that seysine, and the person disseysed has sued out a writ of entry against the heir by reason of the disseysine, which the father of the heir effected in regard to the inheritance of his mother, if the heir responds that he has not an entry by the disseysine which his father has made, on the contrary by his descent from his mother, who died seysed of it as of fee simple and of right, and who effected no disseysine, that response will not avail to prevent an action proceeding against him, because in truth, although that land was the inheritance of his mother, she had an unjust entry into it by the disseysine effected by her husband, nor had the heir any seysine thereof except through the disseysine effected by his father, and by the unjust entry of his mother after the disseysine effected by his father. And therefore the vice of the thing,

est ex parte patris & ex patre matris, & succedit hęres in vitium, quāvis per intermediam personam, & ideò recuperabit petens per tale breve: ut de itinere M. de Pateshull de loquelis, quæ fuerunt super judicium in diversis comit̃ anno regni regis H. 3 in comitatu Glouc. de Richardo Curpet, qui impetravit breve super W. comitem marshal[1] juniorem, & qui respondit quòd non habet ingressum p̄ W. patrem suum, immò per comitissam matrem suā, cujus hęreditas terra illa fuit, & quæ inde obiit seysita, ut de feodo & jure. Eodem modo si, cùm vellet, non posset sibi perquirere nec per se nec per alium, ut si gravi languore detentus, licet memoriam non amiserit. Et quamvis memoriam amiserit ante disseysinam, & per hoc desinere non possit possidere civiliter, licet desinat possidere naturaliter per ejectionem, competunt hęredi duo remedia, s. breve de ingressu (si legerit[2]), ut hic, vel assisa mortis antecessoris, ut inferiùs dicetur. Item eodem modo, si propter brevitatem temporis sibi perquirere non possit, ut si hodiè disseysitus, statim, vel in crastino, vel secundo, vel tertio, vel quarto die moriat̃, & ita q̄ tempus disseysitori sufficere non possit pro titulo. Eodem modo competunt hæredi duo remedia ut supra: quia antecessor in utroque casu satis moritur seysitus ut de feodo, & hęres nihilominus habere posset breve de ingressu etiam sine clausula, cùm nihil possit imputari negligentię antecessorū. Si autem negligens inveniatur q̄ sibi non perquisiverit, cùm posset, quasi sui juris contemptor sibi prejudicat

[1] "comitem marescallum," MS. Rawl. C. 160.

[2] "si elegit," MS. Rawl. C. 160.

which has been contracted on the part of the father and on the part of the mother, adheres to the heir, and the heir succeeds to that vice, although through an intermediate person, and accordingly the plaintiff shall recover by a writ of this kind, as in the circuit of Martin de Pateshull concerning the imparlances which were made upon a judgment in divers counties in the third year of the reign of king Henry in the county of Gloucester, concerning Richard Curpet, who sued out a writ against William earl Marshal the younger, and who responded that he had not an entry through William his father, on the contrary through the countess his mother, whose inheritance that land was, and who died seysed of it, as in fee simple and of right. In the same way if, when he was desirous, he could not apply for a writ neither by himself nor by another person, as if he has been detained by a severe illness, although he has not lost his memory. And although he has lost his memory before the disseysine, and thereby could not cease to possess civilly, although he ceased to possess naturally through the ejectment, the heir is entitled to two remedies, to wit, a writ of entry (if he chooses) as here, or an assise of the death of an ancestor, as will be explained below. Likewise in the same manner, if on account of the shortness of time he could not apply for a writ for himself, as if having been disseysed on a certain day he should die forthwith, or on the morrow or the second day or the third day or the fourth day, and so that the time cannot be sufficient to give a title to the disseysor. In the same way the heir is entitled to two remedies as above; because the ancestor in each case dies sufficiently seysed, as in fee simple, and the heir may have nevertheless a writ of entry even without a clause, since nothing can be imputed to the negligence of his ancestors. But if he has been found negligent that he has not applied for a writ when he might, as it were a despiser of his own right he prejudices himself and his heirs, since

& heredibus suis, cùm negligētia & patientia inducāt cōsensum, & dissimulatio longa tollat injuriam, & tale erit prejudicium, q heres vix audiri poterit super pprietate p breve de recto. Cùm autem disseysitus diligens fuerit, ut prædictum est, vel cùm nihil sit q possit negligentiæ suæ imputari, datur hæredi actio p breve formatum hoc modo in psona hæredis disseysitoris.

2. Breve de ingressu formatum de modo procedendi in hujusmodi placito. f. 219 b.

Rex vic. salutē. Præcipe A. q justè &c. reddat B. tantū terre cū pertinentiis in tali villa, & in quā nō habet ingressum nisi p C. patrē ipsius A. cujus hæres ipse est, qui prædictum B. inde injustè & sine judicio disseysivit, & postquam &c. Et unde assisa novæ disseysinæ summonita fuit coram justiciariis nostris ad primam &c. & visus terræ captus, & remansit assisa capienda, eo quòd prædictus C. obiit ante captionem illius assisæ, vel antequam justiciarii nostri in partes illas venirent. Et nisi fecerit, & idem B. fecerit te securum de clamore &c. tunc summoneas &c. quòd sit coram justiciariis &c. ostensurus quare non fecerit, & habeas ibi summonitores & hoc breve. Et habebit locum breve istud tam versus extraneos, qui ingressum habuerunt per disseysitorem, unum vel plures, quatenus gradus ingressus[1] & personæ permiserint, quàm versus hæredes disseysitoris, vel versus eos qui ingressum habuerint per hæredes usque ad tertiā personam inclusivam: ut si dicatur, Præcipe A. &c. quòd justè &c. reddat B. tātum terræ cum pertinentiis in tali villa, in quam ingressum non habet nisi per C. filium & hæredem D., qui terram illam ei dimisit, postquam idem D. injustè & sine judicio disseysiverit ipsum B. (vel si disseysitus mortuus fuerit

[1] " et gressus," MS. Rawl. C. 160.

negligence and patience imply consent, and long dissimulation takes away the injury, and the prejudice will be such, that the heir will scarcely be listened to upon the subject of the property by a writ of right. But when the person disseysed has been diligent, as aforesaid, or when there is nothing which can be imputed to his negligence, an action is given to the heir by a writ drawn up in this manner against the person of the heir of the disseysor.

2. A writ of entry drawn up for the mode of proceeding in a plaint of this kind. f. 219 b.

The king to the viscount greeting. Enjoin A., that he should justly &c. restore to B. so much land with its appurtenances in such a vill, and into which he has no entry except through C. the father of A. himself, whose heir he is, who unjustly and without a judgment disseysed the aforesaid B. therefrom, and afterwards, &c., and whereupon an assise of novel disseysine has been summoned before our justiciaries at their first coming, &c., and a view of the land has been had, and the assise remained to be held, inasmuch as the said C. died before the holding of that assise, or before our justiciaries came into those parts. And unless he has done it, and [if] the said B. has furnished sureties to prosecute his claim, &c. then summon, &c., that he present himself before the said justiciaries, &c., to show why he has not done it, and have there the summoning officers and this writ. And this writ shall have place as well as regards strangers, who have had entry through the disseysor, one or more, as far as the grades of entry and the persons have permitted, as against the heirs of the disseysor, or against those who have entry through the heirs as far as the third person inclusive, as if it be said, Enjoin A. &c. that justly &c. he restore to B. so much land with its appurtenances in such a vill, into which he had no entry except through C. the son and heir of D., who demised that land to him, after the said D. unjustly and without a judgment disseysed B. himself (or if the person disseysed is dead and the heir of the person disseysed

& hæres disseysiti petat versus hæredem disseysitoris, & tunc sic) Præcipe A. q justè &c. reddat B. tantum terræ cum pertinentiis in tali villa, & in quam non habet ingressum nisi per C. filium & hæredem B., qui terram illam ei dimisit, postquam idem D. injustè & sine judicio disseysiverat E. patrem, avunculum vel amitam ipsius B., vel alium antecessorem, cujus hæres ipse B. est, ut dicit. Item si quis disseysitorem disseysiverit, & postea rem ad alium transtulerit, tunc dici non potest quòd primus disseysitor ei dimisit. Et ideò dicatur sic: in quam non habet ingressum nisi per talem, qui injustè & sine judicio disseysivit talē, postquam idē talis talis disseysiverat querentē vel ejus hæredem propinquum vel remotum, vel sine mentione de ingressu. Et si hujusmodi tenementum ulteriùs quàm ad tertiā psonā trāslata non fuerit, locū non habebit breve de ingressu, nisi sit qui dicat, q sine mentione de ingressu fieri possit breve hoc modo: Præcipe A. q justè &c. reddat B. tantum terræ &c. unde C. de A. injustè &c. disseysivit ipsum B. vel C. patrem vel alium antecessorem ipsius B., cujus hæres ipse est, ut dicit. Si autem fieri debeat breve in persona hæredis disseysiti versus ipsum disseysitorem qui vivit, qualiter fieri debet satis videri poterit ex præmissis. Cùm autē sum̄onitus fuerit tenens, ad diem sibi datū poterit se essoniare, & eodē modo petens si voluerit, & post essonium petere possit[1] visum terræ & jacebit. Item vocare poterit warrantum[2] sive mētio fiat de ingressu sive non, dum tamē si fiat mentio de ingressu, fiat vocatio de p̄sona in p̄sonā, ut de warranto in warrantum, de personis in brevi nominatis p ordinem usq; ad ipsum disseysitorē vel ejus hæredem. Alii verò warranti vocari non debent quàm in brevi

[1] "poterit," MS. Rawl. C. 160. | [2] "warrentium," *id.*

claims against the heir of the disseysor, and then so) Enjoin A. that he justly, &c. restore to B. so much land with its appurtenances in such a vill, and into which he has had no entry except through C. the son and heir of B., who demised that land to him, after the said D. had unjustly and without a judgment disseysed E. the father, the uncle, or the aunt (as the case may be) of B., or some other ancestor whose heir B. is, as he says. Likewise if any one has disseysed the disseysor, and has afterwards transferred the thing to another, then it cannot be said that the first disseysor has demised it. And accordingly let it be said thus, into which he has no entry except through such a person, who unjustly and without a judgment has disseysed such an one after he had disseysed the plaintiff or his heir near or remote, or without mention of the entry. And if a tenement of this kind has not been transferrred further than to a third person, a writ of entry shall not have place, unless there be some one who says that without mention of entry a writ may be made in this manner: Enjoin A. that justly, &c. he restore to B. so much land, &c., whence C. de A. has unjustly, &c. disseysed B. himself, or C. [has unjustly disseysed] the father or other ancestor of B., whose heir he says that he is. But if the writ ought to be made in the person of the heir of the party disseysed against the disseysor who is alive, it can be sufficiently seen from the premises how it ought to be framed. But when the defendant has been summoned, on the day named to him, he may essoin himself, and in the same way the plaintiff if he wishes, and after the essoin, he may claim a view of the land and it shall hold good. Likewise he may vouch a warrantor whether mention is made of entry or not, provided however if mention is made of entry, let the vouching be from person to person as from warrantor to warrantor, as regards the persons named in the writ in order up to the disseysor himself or his heir. And other warrantors ought not to be called than those

nominati: quia si non nominati vocarentur & extra breve, eadem ratione qua vocaretur unus, possent vocari mille, & ita nō teneret breve de ingressu. Si autem nulla fiat mentio de ingressu (ut prædictum est) in brevi, in gradibus nec personis, tunc vocari possunt plures in infinitum. Item si mentio fiat de ingressu, respondere poterit tenens multipliciter ad breve & ad alia ut suprà. Item quòd non habet ingressum per talem in brevi nominatum, sed per alium
f. 220. talem non nominatum, quòd si probatū fuerit, cadit breve. Item respōdere poterit q talis antecessor nō disseysivit, sed alius. Item q non injustè sed justè, & ferè omnes habebit responsiones & defensiones hæres disseysitoris, quas haberet ille disseysitor contra assisam novæ disseysinæ si viveret, eo quòd tale breve de ingressu naturam sapit assisæ novæ disseysinæ ad omnia quoad restitutionem, licet non quoad pœnam, & omnia terminari poterunt per juratam. Pœna autem in judicio extinguitur. Non enim erit pœna corporalis infligenda propter modum disseysinæ antecessoris, nec veniunt damna, nec dabitur bos, nisi tantum misericordia pro injusta detentione. Cùm autem assisa novæ disseysinæ capta fuerit sive tenens amiserit sive querens per assisam, contingit multotiens quòd jratores malè juraverint, & quòd ille qui per assisam amiserit sibi perquirat per juratam viginti quatuor ad convincendum duodecem, & quòd ante captionem illius juratæ moriatur tenens vel querens, & unde succurritur hæredi eodem modo, quo suprà in assisa novæ disseysinæ, quia ubi eadem ratio idem jus esse debet, & cum ingressu & sine, ut supra. Forma brevis talis est, ut inferius de convictionibus.

named in the writ, because if persons not named are called who are not in the writ, by the same reason on which one is called, a thousand may be called, and so a writ of entry would not bind. But if there be no mention of entry (as above said) in the writ in grades nor in persons, then several may be called without end. Likewise if there be mention of an entry, the plaintiff may respond in manifold ways to the writ and to the other things as above. Likewise that he has not an entry through such an one named in the writ, but through another not named, which if it be proved, the writ falls. f. 220. Likewise he may respond that such an ancestor of his did not disseyse him, but another. Likewise that he did so not unjustly but justly, and the heir of a disseysor will for the most part have all the responses and defences which the disseysor himself would have against an assise of novel disseysine, if he were alive, because such a writ of entry savours of the nature of an assise of novel disseysine in all matters which regard restitution, although not as regards a penalty, and all matters may be determined by the jury. But the penalty is extinguished in the judgment. For no corporeal punishment is to be inflicted on account of the mode of disseysine of the ancestor, nor do damages come into account, nor shall an ox be given, except as an amerciment for an unjust detention. But when an assise of novel disseysine has been held, whether the defendant or the plaintiff has lost by the assise, it happens on manifold occasions that the jurors have sworn wrong, and that he who has lost by the assise applies for a writ for a jury of twenty-four persons to convict the twelve, and that before the impanelling of this jury the defendant or the plaintiff dies, and therefore the heir is succoured in the same manner, as above in an assise of novel disseysine, because where there is the same reason, there ought to be the same right, and with an entry and without, as above said. The form of the writ is such as will be given below in treating of convictions.

Cap. XXXVI.

1. Si firmarius infra terminum suum ejectus fuerit.

Dictū est supra qualiter quis restituatur cùm fuerit ejectus de libero teñto suo: nunc dicendū si quis ejiciaī de usu fructu, vel usu & habitatione alicujus tenementi q tenuerit ad terminum annorum ante terminum suum. Poterit enim quis in uno & eodem tenemento habere liberum tenementū, & alius usum fructum & usum & habitationem. Solent aliquandò tales (cùm ejecti essent infrà terminum suum) pquirere sibi p breve de conventione: sed quia tale breve locum habere non potuit inter aliquas personas, nisi tantū inter illū qui ad firmam tradidit & ad terminum, & illum qui ceperit: nec alios obligare potest obligatio conventionis: & etiam quia inter tales psonas vix vel non sine difficultate potuit terminari negotium, de consilio curiæ pvisum est firmario contra quoscūq, dejectores p tale breve.

2. Breve ad recuperandam firmam.

Rex vicecoñ salutē. Præcipe A. q justè & sine dilatione reddat B. tantū terræ cum ptinentiis in tali villa, quā idem A., qui dimisit &c.; vel sic: si talis fecerit te securum &c. ut infrà, ostensurus quare deforceat tali tantū terræ cū pertinentiis in tali villa, q talis dimisit ipsi tali ad terminum qui nondum præteriit, infrà quem terminum prædictus talis illud vendidit tali, occasione cujus venditionis ipse talis postmodū talem de prædicta terra ejecit ut dicit. Et habeas ibi &c. Teste &c. Et si tale breve competat contra extraneum propter venditionem, multò fortiùs competit contra ipsum dñm qui dimisit & sine causa ejecit, quàm contra extraneum qui causam habuit qualem qualem, si occasione venditionis ei factæ venditor

Chapter XXXVI.

1. If a farmer has been ejected before the end of his term.

It has been said above in what way a person is restored, when he has been ejected from his free tenement. Now we must treat of the case where a person is ejected from the usufruct, or from the use and habitation of a certain tenement, which he may hold for a term of years, before the end of his term. For one person may have in one and the same tenement the freehold, and another the usufruct or the use and habitation. Such persons (when they have been ejected within their term) are accustomed sometimes to apply for a writ concerning the agreement, but because such a writ cannot have place between certain persons, except only between him who has leased land to farm and for a term and him who has taken it, nor can the obligation of the agreement bind others, and likewise because between such persons the business can scarcely or at least not without difficulty be determined, by the advice of the court provision has been made for the farmer against all ejectors by a writ of this kind.

2. A writ to recover a farm.

The king to the viscount greeting. Enjoin A. that justly and without delay he restore to B. so much land with its appurtenances in such a vill, which the said A. who demised it, &c.; or thus: if such an one has given security to you, &c., as below, with intention [to show wherefore he by force took away from so-and-so so much land with its appurtenances in such a vill, which such person demised to so-and-so for a term which has not yet passed, within which term such person aforesaid sold it to another, by occasion of which sale the said party ejected so-and-so aforesaid from the aforesaid land, as he says, and have there, &c. Witness, &c. And if such a writ is allowable against a stranger on account of a sale, much more is it allowable against the lord himself who demised it and without cause ejected him, than against a stranger, who had some cause, whatever it might be, if on occasion of a sale made to him the vendor has

firmarium ejecit, vel aliter si alius ejecerit quàm ille qui dimisit, & tunc sic: Quàm C. de N. ei dimisit ad terminum qui nondū prætériit, infrà quem terminum
f. 220 b. prædictus A. vel prædictus C. ipsum B. de eadem terra vel firma sua injustè ejecit ut dicit: & nisi fecerit, & prædictus B. fecerit te securum, tunc sum̄one &c. Poterit etiã breve istud (secundùm quosdam) aliter formari, ita s., si A. fecerit te securum &c. tunc summoneas B. q̧ sit coram &c. ad respondendum eidem A. quare injustè ejecit eum de tanto terræ &c. quam idem A. vel alius C. s. ei dimisit ad terminum qui nondum prætériit, infra quem terminum &c. ut supra. Sed forma prima magis competens & compendiosa est p̧pter captionem in manum dñi regis ad vitanda atachiamenta & dilationes. Non magis poterit aliquis firmarium ejicere de firma sua quàm tenentem aliquem de libero tenemento suo. Et unde si ille ejecerit, qui tradidit, seysinam restituet cum damnis, quia talis restitutio non multum differt à disseysina. Si autem alius quàm qui tradidit ejecerit, si hoc fecerit cum autoritate & voluntate tradentis, uterq̧ tenetur hoc judicio, unus p̧pter factum & alius propter autoritatem. Si autem sine voluntate, tunc tenetur ejector utriq̧ tam dño p̧prietatis quàm firmario: firmario p̧ istud breve, dño p̧prietatis p̧ assisam novæ disseysinæ, ut unus rehabeat terminum cum damnis, & alius liberum tenementum suum sine damnis. Si autem dñs proprietatis tenementum ad firmam traditum alicui dederit in dominico tenendum, seysinam ei facere poterit, salvo firmario termino suo. Poterit enim eum inducere in seysinam vacuam quantum ad ipsum & suos, & attornare ei firmarium & servitium suum, dum tamen

[1] "attachiamenta," MS. Rawl. C. 160.

ejected the farmer: or otherwise if another person than he who demised it has ejected him, then thus: which C. de N. demised to him for a term, which has not yet passed, within which term the aforesaid A. or the aforesaid C. ejected the said B. from the said land or f. 220 b.
his farm unjustly, as he says, and unless he does it and the said B. has given you security, then summon, &c. The writ according to some may be otherwise framed, thus, to wit, if A. has given you security, &c., then summon B. that he present himself, &c. to answer to the said A. wherefore he ejected him from so much land, &c., which the said A. or another person, C. to wit, demised to him for a term which has not yet passed, within which term, &c., as above. But the first form is more suitable and compendious on account of the taking it into the hand of the king to avoid attachments and delays. A person cannot eject a farmer from his farm any more than a tenant from his free tenement. And hence if he, who delivered it, has ejected him, he shall restore the seysine with the damages, for such a restitution does not differ much from a disseysine. But if another than he, who delivered it, has ejected him, if he has done this with the authority and will of the deliverer, each is bound by this judgment, one on account of his act, the other on account of his authority. But if he has done it without his will, then the ejector is liable to both, as well to the lord of the property as to the farmer; to the farmer by that writ, to the lord of the property by an assise of novel disseysine, that the one may have again the term with damages, and the other his freehold without damages. But if the lord of the property has given the tenement, which has been delivered to any one to farm, to be held in demesne, he may give him the seysine, saving to the farmer his term. For he will be able to induct him into a vacant seysine as regards himself and his dependants, and to attourn to him the farmer and his service, provided however

feoffatus non utatur, nec expletia capiat maximè, nec firmarium impediat uti, nec ipsum ejiciat. Poterit enim quilibet illorum sine præjudicio alterius, quia rectè dicimus totū nostrum fundum esse, & cùm usus fructus alienus sit, quia nō dominii pars est usu fructus, sed servitus fit vel via &c.[1] Nec falsò dicitur meum esse, cujus non potest pars dici[2] alterius esse in seysina, esse ejusdem tenementi, unus ut de termino & alius ut de feodo & libero tenemento.[3] Et datur ista actio hæredibus, & competit contra hæredes ut supra in assisa novæ disseysinæ.

Cap. XXXVII.

1. De assisa, si quis sine judicio fuerit disseysitus de iis, quæ sunt de pertinentiis liberi tenementi sicut de juribus, ut si sint servitutes, quæ pertinent ex alieno fundo ad fundum vicinum, sicut pastus pecorum, scilicet communia pasturæ. f. 221.

Dictum est supra qualiter rerū corporaliū acquiruntur dominia, & de acquirenda possessione, & quale remediū cōpetit ei qui à tenemēto suo ejectus fuerit, & qualiter restituaī ei possessio, libertas, & pax si possessio ꝑturbeī. Nunc autē dicendū, qualiter quis restituatur, si fuerit ejectus injustè de iis quę ꝑtinēt ad liberū teñtū. Pertinēt enim ad liberū teñtū jura, sicut & corpora: jura sive servitutes diversis respectibus. Jura autem sive libertates dici poterunt ratione teñtorū, quibus debēī. Servitutes verò ratione tenementorum à quibus debentur, & semper consistunt in alieno & nō in ꝑprio, quia nemini servire potest suus fundus ꝑprius; & nullus hujusmodi servitutes constituere potest, nisi ille qui fundum habet & tenementū, quia prædiorum[4] aliud liberum, aliud servituti supposito. Liberum dici poterit quod in nullo tenetur, vel astringiī prædiis vicinorum. Si autem teneaī, diciī

[1] "servitutis fit, ut via vel iter," MS. Rawl. C. 160.

[2] "ulla pars dici," *id.*

[3] "et ejusdem tenementi unus ut "de termino, et alius ut de feodo "vel libero tenemento," MS. Rawl. C. 160.

[4] "quia prædiorum" down to "propter vicinitatem," is transferred in MS. Rawl. C. 160, and comes in after "prædiale."

that the feoffee does not use it nor take the profits chiefly nor impede the farmer in using it, nor eject him. For any of them will be able without prejudice to another, because we say rightly that the whole is our estate, even when the usufruct is another's, because the usufruct is not part of the dominion, but a servitude or a way, &c. Nor is it falsely said to be mine, of which not any part can be said to be in the seysine of another, and of the same tenement one is in possession as it were of the term, and another of the fee and the freehold. And this action is permitted to heirs, and is allowed against heirs as above in an assise of novel disseysine.

Chapter XXXVII.

1. Of an assise, if any one has been disseysed without a judgment of those things, which are the appurtenances of a freehold, as of rights, as if there be servitudes upon another's land, which belong to a neighbour's land, as the feeding of sheep, to wit, a community of pasture.

It has been discussed above in what way the dominion of corporeal things is acquired, and concerning the acquisition of possession, and what remedy attaches to him who has been ejected from his tenement, and in what way are restored to him possession, liberty, and peace, if his possession is disturbed. Now let us discuss in what way a person is restored, if he has been unjustly ejected from those things which pertain to his freehold. For rights just as corporeal things pertain to a freehold, rights or servitudes in different respects. For rights or liberties may be spoken of with reference to the tenements, to which they are due. But servitudes with reference to the tenements, from which they are due, and they always consist in another's property, and not in one's own, as nobody can have a servitude out of his own land, and no one can establish a servitude of this kind except he who has the estate and the tenement, for of lands some are free, others subject to a servitude. That may be called free which is in no respect bound or liable to a service towards the neighbouring lands. But if it be bound, that, f. 221.

Britton, ii. ch. xxiii. Fleta, 251.

servituti suppositum, q̄ priùs fuerat liberum, & hoc sive teneatur prædio sine teñto alieno[1] de volūtate & cōstitutione dñorum, vel p̄pter servitium certum,[2] vel p̄pter vicinitatē, quia si fuerit incertū,[3] ut si quis plus dederit, aliquādò minus, hæc esset potius emptio herbagii quā pastura, & hoc erit potius p̄sonale quàm prædiale. Itē eodē modo si quis temporibus ad voluntatē suā. Itē herbagium dici poterit, si cui concedatur, quia non habet liberum teñtum ad q̄ p̄tinere possit. Et talis dici poterit constitutio, qua domus domui, rus ruri, fundus fundo, tenementum tenemento subjungatur, & non tantum p̄sonæ p̄ se, vel tenementum p̄ se, sed uterquè simul tam teñtum quàm p̄sonæ. Et ita p̄tinent servitutes alicujus fundo ex constitutione sive ex impositione de voluntate dominorum. Item p̄tinere poterunt sine constitutione per longum usum, continuum & pacificum, & non interruptum p̄ aliquod impedimentum contrarium, ex patientia inter præsentes quæ trahitur ad consensum. Et unde licet servitus expressè nō imponaī vel cōstituatur de voluntate dñorū, tamen si quis usus fuerit p̄ aliquod tēpus pacificè sine aliqua interruptione nec vi, nec clam, nec precariò, q̄ idem est q̄ de gratia, ad minus sine judicio disseysiri non potest, quia si violentia adhibeatur, nūquā erit jus disseysitoris p̄pter temporis diuturnitatē, nisi p̄ negligētiā ipsius, qui vim patiī, ex lōga & pacifica & cōtinua possessione inter præsētes, secus inter absentes, & talis seysina multipliciter poterit interrumpi. Si autem fuerit seysina clandestina, s. in

[1] "sive tenemento alieno," MS. Rawl. C. 159.

[2] "dominorum propter servitium "certum," *id.*

[3] "si fuerit incertum" down to "Et talis dici poterit," omitted MS. Rawl. C. 159.

which has been formerly free, is said to be subjected to a servitude, and this whether it is bound to the land or the tenement of another by the will and appointment of the lords, either on account of a certain service, or on account of vicinity, because if the service be uncertain, as if a person has given at one time more, and at another time less, this would be rather a buying of the herbage, than a pasturage, and this would be rather a personal than a prædial service. Likewise in the same manner, if a person has granted it at times according to his own will. Likewise it may be called herbage, if it be granted to any one, because he has not a tenement, to which it can belong. And that may be said to be a constitution, whereby a house is made subject to another house, the country to the country, an estate to an estate, a tenement to a tenement, and not merely persons by themselves, or a tenement by itself, but both at the same time, the tenement as well as the persons. And thus servitudes belong to an estate from a constitution or an imposition of them by the free will of the lords. Likewise they may belong to them without a constitution by long, continuous, and peaceable usage, not interrupted by any impediment contrariwise, from sufferance between those present, which is taken for consent. And hence although a servitude is not expressly imposed nor constituted by the free will of the lords, nevertheless if any person has enjoyed it for some time peaceably without any interruption, neither by violence, nor secretly, nor precariously, which is the same as of favour, at least he cannot be disseysed without a judgment, because if violence be applied, the disseysor will never have the right on account of length of time, except through the negligence of him, who suffers the violence, from long and peaceable and continuous possession between those who are present; it is otherwise between the absent, and such a seysine may be interrupted in manifold ways. But if it has been a clandestine seysine, to wit, in the absence of

absentia dominorū vel illis ignorantibus, & si scirent, essent ꝑhibituri, licet hoc fiat de consensu vel dissimulatione ballivorū, valere nō debet. Si autem precariò fuerit & de gratia, quæ tempestivè revocari possit & intempestivè, ex lōgo tēpore nō acquiriť jus, nec in casu ꝓximo notato. Illud autem, quod de gratia est, ad voluntatē cōcedentis revocari poterit quocūq; tēpore, q quidē nō est in cōmodato. Potest etiā servitus ita constitui in ꝓprio, ne liceat dño fundi pascere in suo ꝓprio, & sic constituitur servitus in fundo alieno, aliquādò ab homine, aliquandò ex patientia & usu. Et eodem modo imponitur quandòq à jure & nec ab homine nec ab usu, s. ne quis faciat in ꝓprio per q damnū vel nocumentum eveniat vicino. Nocumentum enim poterit esse justum, & poterit esse injuriosum. Injuriosum, ubi quis fecerit aliquid in suo injustè contra legem vel contra cōstitutionē, ꝑhibitus à jure. Si autem prohiberi à jure nō possit ne faciat, licet nocumentū faciat & damnosum, tamen non erit injuriosum; licitum est enim unicuiq; facere in suo, quod damnum injuriosum nō eveniet vicino, ut si quis in fundo ꝓprio construat aliquod molēdinū, & sectā suā & aliorū vicinorū substrahat vicino, facit vicino dānū & non injuriā: cùm à lege vel à cōstitutione ꝑhibitus nō sit, ne molēdinū habeat vel cōstruat. Itē
Britton, *ib.* § 5. Fleta 252. à jure imponiť servitus prædio vicinorū, s. ne quis stagnum suum altiùs tollat ꝓ q tenemētū vicini submergať. Itē ne faciat fossam in suo, ꝓ quā aquā vicini

the lords or whilst they are ignorant, and, if they had known it, they would have been likely to prohibit it, although this may be done with the consent and dissimulation of the bailiffs, this ought not to avail. But if it be precarious and of favour, which may be recalled seasonably or unseasonably, it does not acquire right from length of time, nor in the next case noted. But that which is of favour, may be recalled at the will of the grantor at any time, because it is not in the nature of a thing lent. A servitude also may be so established in his own land, that it may not be lawful for the lord of the estate to feed cattle on his own property, and so a servitude is established in another person's estate, sometimes by a man's appointment, sometimes from sufferance and use. And in the same manner it is sometimes imposed by right, and neither by man's appointment nor by use, to wit, that no one may do in his own estate any thing whereby damage or nuisance may happen to his neighbour. For a nuisance may be just, and it may be injurious. Injurious, when any one has done any thing on his own estate unjustly against the law or against a constitution, being prohibited by right. But if he cannot be prohibited by right from doing a thing, although he does a thing, which is a nuisance, and causes damage, nevertheless it will not be injurious, for it is allowable to every one to do with his own, that which will not cause injurious damage to result to his neighbour, as if a person should construct within his own ground a mill, and withdraws from his neighbour his own suite and that of other neighbours, he causes to his neighbour damage, but not injury, since neither by law nor by any constitution is he prohibited from having or constructing a mill. Likewise a servitude is imposed by law upon the land of a neighbour, to wit, that no person shall raise his pond of water so high as to submerge a neighbour's tenement. Likewise that he may not make a foss on his own land, whereby he should divert the water of his

divertat, vel p q ad alveum suum pristinum reverti non possit in toto vel in parte. Item ne q̃d faciat in suo, quo minus vicinus suus omninò uti possit servitute imposita vel concessa, vel quo minus commodè
f. 221 b. utatur, loco, tempore, numero vel genere, qualitate vel quantitate. Et non refert utrum hoc omninò fecerit vel quod tantundem valeat: ut si quis habuerit jus eundi per fundum alienum, non solum facit disseysinam si viam obstruat, sed si ire non permittat omninò commodè, vel ad usum debitum. Item si reficere viam non permittat, ad viam enim pertinet refectio.
Britton, *ib.* § 6. Fleta, 252. Item eodē modo si omninò aquā non divertat, sed fossam faciat vel purgare non ꝑmittat: quia ad aquæ ductum ꝑtinet purgatio, sicut ad viam ꝑtinet refectio. Item licet omninò non impediat, si fecerit tamen quo minus cōmodè, facit disseysinam, ut si communiam habeat[1] in certo loco cum libero & competenti ingressu & egressu, faciat quis fossatum & hayam, murum vel palatium[2] per q oportet me ire per circuitum, ubi priùs ingressus sum p compendium, salvo tamen vicino jure suo, si recenter ad querelam ejus, qui injuriam passus est, q suum fuerit,[3] exequatur. Et propter communem utilitatem, ne quis diu suo jure uti impediatur, & ita si non commodè. Hoc q dicitur[4] trahi debet ad nocumentum justum & injuriosum, de fossato vel haya injustè levatis. Item si cui concedatur jus pascendi certo tempore, & non permittat eum uti aliquo tempore. Item si omni tempore non permittat eum uti, nisi certis temporibus vel certis horis. Item cùm uti debeat ubiquè, non permittatur uti nisi certis locis &

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[1] "habeam," MS. Rawl. C. 160.
[2] "palicium," *id.*
[3] "quod suum fuit," *id.*
[4] "Hoc quod dicitur" down to "injuste levatis" is omitted in MS. Rawl. C. 160. It has the appearance of a side-note, which has been interpolated into the text.

neighbour, or whereby it cannot return, either in whole or in part, to its ancient bed. Likewise that he should not do in his own property any thing to prevent his neighbour enjoying a servitude imposed or granted in his favour, or to prevent him using it conveniently in place, time, or number, or kind, in quality or in quantity. Likewise it does not matter whether he has done this very thing or what is equivalent to it: as if a person has had the right of passing across the land of another person, the latter not only causes a disseysine, if he obstructs the way, but if he does not permit him to pass conveniently, or for his due use. Likewise if he does not permit him to repair the road, for reparation pertains to the road. Likewise in the same manner, if he does not in fact turn aside the water, but makes a foss or does not allow it to be cleansed, for cleansing pertains to a watercourse, as reparation pertains to a road. Likewise, although he does not in fact impede, if however he has done any thing to prevent his convenient use of it, he causes a disseysine, as if I have a right of common in a certain place with free and competent ingress and egress, a person makes a foss or a hedge, a wall or a palisade, whereby I am obliged to go round by a circuitous way, where I have formerly entered by a compendious way, saving however to a neighbour his right, if recently at the complaint of him who has suffered an injury, he performs what was his own. And on account of common utility, lest any one should be impeded a long time from using his right, and if so, to his inconvenience. This which is stated ought to be treated as a nuisance just and injurious, concerning a foss or a hedge unjustly raised. Likewise if there be granted to any one the right of pasture at a certain time, and he does not permit him to enjoy it at any time. Likewise if he does not permit him to enjoy it at all times, but only at certain times or certain hours. Likewise when he ought to use it everywhere, he is only

f. 221 b.

coarctatis. Item cùm jus habeat pascendi ad omnia averia & omnimoda & cujuscunq; generis, nō permittit eum uti nisi ad quædam genera averiorum & determinata, omnibus aliis averiis pænitùs exclusis. Item si constituatur jus pascendi ad certū numerum, nō ꝑmittit uti nisi ad minorem numerum, & sic non debito modo, & quilibet modus habet in se debitam commoditatem. Et illud idem videri poterit in cursu aquarum, ut si cui concedatur jus aquæ ducendæ, non permittat eum omninò ducere vel non commodè, quia non permittit purgare, vel si id quod continuè ducere deberet, non ꝑmittit ducere nisi certis horis & temporibus. Item q integrè, non permittit ducere nisi in parte, & ita erit disseysina manifesta, cum nullo modo vel non commode nec modo debito permittat uti.

2. Si quis non possit uti propter vim, competit assisa novæ disseysinæ domino fundi.

Si autem debitum modum excedat quis, incontinenti repelli poterit, post tempus verò non nisi cum causæ cognitione: & sic (ut prædictum est) poterit quis habere servitutem in fundo alieno & uti, nisi prohibeatur ex justa causa. Jura siquidem, quæ quis in fundo alieno habere poterit, infinita sunt. Et in omnibus istis casibus, ubi competit assisa novę disseysinę de communia pasturę ei, cui concessa est libertas pascendi, si commode vel debito modo ut prædictum est. Item econverso competit domino concedenti assisa novæ disseysinæ de libero tenemento, si ille, cui concessa est, præsumptuose vel aliter, quàm fuit constituta, uti velit, ut si per vim uti vellet, cùm non esset constituta. Item eodem modo & eisdem causis quibus res copor-

permitted in certain narrowly confined places. Likewise when he has a right of pasture of all cattle and of all sorts and of whatever kinds, he does not permit him to use it except for certain definite kinds, all other kinds being entirely excluded. Likewise if there be established a right of pasture for a certain number, and he does not permit him to use it except for a smaller number, and so not in due manner, and each manner has in itself a due convenience. And that may be seen in the flowing of water, as if there be granted to any one the right of a water-course, and he does not permit him to draw water at all, or not conveniently, because he does not permit him to cleanse it, or if he ought to draw it at all hours, he does not permit him to draw it except at certain hours and times. Likewise when he ought to draw it entirely, and he does not allow him to draw it except partially, and so there will be a manifest disseysine, since he does not permit him to use it either at all or at his convenience or in due manner.

2. If a person cannot enjoy it on account of violence, the lord of the land is entitled to an assise of novel disseysine.

But if a person exceeds the due measure, he may be repelled forthwith, but after a time not so without cognisance of the cause, and thus (as aforesaid) a person may have a servitude upon the land of another and use it, except he be prohibited from a just cause. The rights indeed, which a person may have in the land of another, are infinite. And in all these cases, an assise of novel disseysine concerning a common right of pasture is competent to every one, who has a grant of liberty of pasture, if he is impeded as above said from enjoying it conveniently and in due manner. Likewise conversely the lord is entitled to an assise of novel disseysine concerning the freehold, if he, to whom the right of pasture has been granted, wishes to use it presumptuously or otherwise than it has been established, as if he wishes to use by force, when it has not been so appointed. Likewise in the same manner and for the same causes, by which corporeal things are acquired, rights also are ac-

rales acquiruntur, acquirūtur & jura, secundùm q̄ infinitę sunt, ut supra de rerum acquisitione. Et eodem modo quo acquiruntur secundùm rerum incorporalium acquisitionem & justè, eodem modo amitti poterunt & injustè. Acquiruntur enim res corporales animo & corpore p̄ traditionem. Res autem incorporales sicut jura & servitutes, cùm loca fuerint determinata, acquiruntur, s. ex solo aspectu accipientis vel sui p̄curatoris, & possidendi voluntate et affectu, quia traditionem non patiuntur jura, ut videri poterit. Si quis fundo suo talem imposuerit servitutem, q̄ liceat vicino immittere averia sua ad pasturam, ita poterit fundus suus (licet liber esset ab initio) servire fundo vicino. Et sic ex tali conventione & mutua utriusq̄ voluntate tenet servitus, dum tamen interveniat accipientis voluntas & aspectus, cùm hujusmodi jura traditionem non accipiant. Et quo casu, statim erit in seysina, licet statim non immittat averia sua, & semper videtur uti, donec seysinam suam amiserit p̄ nō usum, id est donec fuerit disseysitus in toto vel in parte, s. q̄ averia sua immittere non posset cùm velit; vel si, cùm semel immiserit, uti non possit commodè vel debito modo. Quo casu, eis [1] subveniendum est per assisam, sive usus fuerit sive non, propter solam constitutionem, cùm sit quasi in possessione, quia jura quasi possidentur. Et sic acquiritur possessio servitutis ante usum, sed sine usu ad alium transferri non potest, nisi hoc contineatur in constitutione servitutis, quòd servitus sibi remaneat & hæredibus suis, vel cui illam dare voluerit, vel assignare: vel ubi sic dicat, quòd hoc facere possit cum tenemento, ad q̄ pertinet illa servitus, q̄ tamen non est credendum (ut videtur) sicut

f. 222.

Britton, *ib* § 9.
Fleta, 257.

[1] "eis," the singular "ei" seems to be required by the context, but both the MSS. Rawlinson exhibit "eis."

quired, according to which they are infinite, as above concerning the acquisition of things. And in the same way in which they are acquired according to the acquisition of incorporeal things and justly, in the same way they may be lost and unjustly. For corporeal things are acquired with the mind and body by delivery. But incorporeal things, such as rights and servitudes, when the places are determined, are acquired, to wit, by the view f. 222. alone of the acceptor or his agent, and by the will and affection of possessing, because rights do not admit of delivery, as can be seen. If a person has imposed such a servitude upon his land, that it shall be allowable for his neighbour to turn in his cattle to pasture, in this manner his land (which was free from the commencement) may be subject to a servitude to a neighbouring land, and so from such a convention and the mutual consent of each, the servitude is binding, provided the will and the view of the acceptor intervene, since such rights do not admit of delivery. And in which case he will be forthwith in seysine, although he do not forthwith turn his cattle in, and he appears always to use it, until he has lost his seysine by non-user, that is until he has been disseysed in whole or in part, to wit, that he could not turn in his cattle, when he wished, or if, when he has once turned them in, he could not use it conveniently or in due manner, in which case he must be aided by an assise, whether he has used it or not, on account of the appointment alone, since he is as it were in possession, because rights are as it were subjects of possession. And so the possession of a servitude is acquired before the use of it, but without the use of it cannot be transferred to another, unless this is contained in the appointment of the servitude, that the servitude should remain to himself and his heirs, or to him to whom he wishes to give it or to assign it; or where it says that he may do it with the tenement, to which the servitude belongs, which is not to be believed (as it seems), as may be seen

videri poterit in donatione advocationis. Sic autem, ut dictum est, acquiritur possessio servitutis, sed nunquam retinetur nisi per usum verum, scilicet cùm averia sua immiserit unum vel plura, licet non omnia, vel omnimoda immittat quæ immittere posset per constitutionem. Et eodem modo acquiri & retineri poterit seysina sine aliqua constitutione per patientiam & longum usum. Constitui verò potest servitus multipliciter, ut quis scilicet habeat jus pascendi in fundo alieno. Item jus fodiendi, jus eundi, jus hauriendi, jus piscandi, aquamvè ducendi, jus venandi, & alia infinita possunt esse jura & secundùm quòd habet sub se plures species vel nō habet, & secundùm quòd servitutes plures habent pertinentias, & pertinentias pertinentiarum. Sed quoniam magis celebris est illa servitus per quam conceditur alicui jus pascēdi: ideo primo dicendum est de ea, quæ dicitur communia pasturæ.

Cap. XXXVIII.

1. De communia pasturæ, et quibus modis acquiritur communia pasturæ. f. 222 b. Britton, l. ii. ch. xxiv. § 1.

Commune autem, nomen generale est, & convenit suis partibus, sicut genus se habet ad suas species. Communia enim ex virtute vocabuli componitur ex una & cū, & sub intelligitur alio, i. communia in alieno & una cum alio & non in fundo ꝑprio, quia nemini servit suus fundus proprius, ut supra. Acquiriť enim communia multis ex causis, s. ex causa donationis: ut si quis dederit terram cum ꝑtinentiis & cum communia pasturæ &c. Item ex causa emptionis & venditionis, ut si quis communiam emerit in fundo alieno, ut

in the donation of an advowson. But thus, as has been said, the possession of the servitude is acquired, but it is never retained except by the true use of it, to wit, when he has turned into it one or more of his beasts, although he does not turn in all, nor of all kinds which he could turn in under the appointment. And in the same way the seysine may be acquired and retained without any appointment by sufferance and long use. But a servitude may be appointed in various ways, so that a person may have a right of pasture in another person's land. Likewise a right of digging, a right of way, a right of drawing water, a right of fishing, a right of water-course, a right of hunting, and there may be other infinite rights, and according as each has under it several species or not, and according as servitudes have several appurtenances, and appurtenances of appurtenances. But since the most celebrated is that servitude by which there is conceded to a person the right of pasturing, therefore we will first treat of that which is called common of pasture.

Chapter XXXVIII.

1. Of common right of pasture, and in what modes common right of pasture is acquired. f. 222 b.

But a right of common is a general term, and has a similar relation to its parts, as a genus has to its species. But a right of common (communia) from the nature of the word is composed of "one" (una) and "with" (cum), and the word "another" (alio) is understood, that is, a right of common in another's ground and together with another, and not in one's own ground, because no one has a service in his own ground, as above. For a right of common is acquired from many causes, for instance because of donation, as if any one has given land with its appurtenances and with a right of common pasture &c. Likewise because of purchase and sale, as if any one has purchased a right of common in another's ground, that it should appertain to his tenement, al-

ptineat ad tenementum suum, licet sit de feodo alieno & diversa baronia, & ex constitutione dominorum fundorum. Item acquiritur ex causa dominorum fundorum,[1] sicut p servitium certum. Item ex causa vicinitatis, ut si quis cum vicino, & vicinus cum eo. Item ex longo usu sine constitutione cum pacifica possessione, continua & non interrupta, ex scientia, negligentia,[2] & patientia dominorum, non dico ballivorum, quia[3] p traditione accipiunt̃, ita quòd nec p vim, nec clam, nec precariò ut supra. Et eisdem rationibus pertinere poterit communia ad liberum tenementum, in eo autem quòd communia est nomen generale continens sub se plures species. Est enim communia in eo, quod dicitur pastura, de omni quod edi poterit vel pasci, largè sumpto vocabulo vel strictè: largè, ut si quis habeat in alieno communiam pasturæ, s. herbagii, pessonæ, sive glandis sive nucis, & quicquid sub nomine pessonæ continetur. Item foliorum & frondium; strictè, s. aliquod istorum unum vel duo. Item distingui poterit communia pasturæ per tempora, ut si omni tempore vel certis temporibus & certis horis. Item per loca, ut si ubique & per totum, sine aliqua exceptione. Excipiuntur tamen quædam tacitè, & quandoq, expressè, sicut rationabilia defensa, & exigi non poterunt ratione pasturæ, nisi specialiter concedātur, & non nisi post tempus, qualia sunt blada, prata, ligna, Bingheys[4] sicut ad boves. Item ad vaccas & vitulos suis temporibus. Item ad oves multones & oves matrices, & agnos suis temporibus. Item nec in curia alicujus nec in gardinis, nec in viridariis, nec parcis vel hujusmodi. Item nec in dominicis alicujus, quæ claudi possunt, & excoli; nisi per modum certum

Britton, *ib.* § 2.

[1] "dominorum fundorum," omitted MSS. Rawl. C. 160 and 159.

[2] "negligentia," omitted *id.*

[3] "quæ," *id.*

[4] "Byngeheys," MS. Rawl. C. 160.

though it be of another's fee and of a different barony and by the appointment of the lords of the grounds. Likewise because of the lords of the grounds, as by a certain service. Likewise because of vicinity, as if any one [has agreed] with his neighbour and his neighbour with him. Likewise from long use without an appointmentwith peaceable possession continuous and not interrupted, with the knowledge, the negligence, the sufferance of the lords. I do not say of the bailiffs, because they are taken for delivery, so that it is not held through violence, or clandestinely, or precariously as above. And for the same reasons a right of common may appertain to a free tenement, in so far as a right of common is a general term comprising under it several species. For there is a right of common in that which is called pasture, of everything which can be eaten or fed upon, the term being interpreted widely or narrowly; widely, as if a person shall have in another's ground a common right of pasturage, that is of herbage, mast, or acorns, or nuts, and whatever is contained under the word "mast." Likewise of leaves and flowers; narrowly, to wit, one or two of these. Likewise a common right of pasture may be distinguished by times, as if at all times, or at certain times and at certain hours. Likewise by places, as if everywhere and throughout the whole, without an exception. But some things are excepted tacitly and sometimes expressly, as under reasonable prohibitions, and they cannot be exacted in virtue of pasturage, unless they are specially granted, and not except after a time, as in the case of corn, meadows, woods, paddocks for oxen. Likewise for cows and their calves at their proper seasons. Likewise for wethers and for ewes and lambs at their proper seasons. Likewise not in the curtilage of any one, nor in the gardens, nor in the orchards, nor in the parks, nor in such like places. Likewise neither in the demesnes of any one, which may be closed and cultivated, except by a certain manner of appointment, and

cōstitutionis, & certis temporibus vel certis locis & determinatis & infra certa loca. Item ad certa genera averiorum, vel si ad omnimoda averia & sine numero, vel cum coarctatione, & cum numero, vel ad certum genus averiorum. Item notandum quòd non debet dici communia, quod quis habuerit in alieno sive p̄ precio sive ex causa emptionis, cùm tenementū non habeat ad q̄ possit communia pertinere, sed potiùs herbagium dici debet quàm cōmunia, cum hoc posset esse quasi personale quid, sive certum dederit quis pro herbagio habendo sive incertum.

2. Quod communia dici poterit multis modis.

Item communia dici poterit secundùm q̄ stat in generali, secundùm quod suprà dictum est: habere jus fodiendi in alieno, aurum s., & inde aurifodina dici potest locus iste. Item argentū & inde argēti fodina, & sic de cæteris metallis. Itē jus fodiendi lapides, cretam, arenā & turbam & hujusmodi. Itē communia & non herbagium, ut jus falcādi herbam vel brueram[1] vel hujusmodi, ad rationabile estoverium. Item eodem modo ad secandum in alieno bosco ad rationabile estoverium ædificandi, claudendi & ardendi.

3. Qualiter amittitur communia pasturæ. f. 223.

Videamus nunc qualiter quis amittere possit seysinam communiæ pasturæ, cùm semel fuerit acquisita. Et sciendum q̄ amitti potest de voluntate, eodem modo quo acquisita est de mutua voluntate & consensu, eodem modo dissolvi potest ex mutuâ voluntate partium, si velint dissentire per renuntiationem ex communi voluntate, & per remissionem & quietam clamantiam, & non sufficit, si unus illorum remittere velit & resilire, nisi ambo in hoc consentiant, quia nihil tam

[1] "brueriam," MS. Rawl. C. 160.

at certain times, and in certain and determined places and within certain places. Likewise for certain kinds of cattle, or if for all kinds of cattle and without number, or with restriction and with number, or for a certain kind of cattle. Likewise it is to be noted that it ought not to be called a right of common, which a person has in another's ground either for a price or because of purchase, when he has not a tenement to which the right of common can appertain, but it ought rather to be called a right of herbage than of common, because this may be something personal, whether a person has given something certain for having the herbage or something uncertain.

2. That the term common may be used in many ways.

Likewise the term "right of common" may be used according as it stands in a general sense, according to what has been said above, as to have the right of digging in another's ground, as for gold, and hence that place may be termed a gold digging. Likewise for silver, and hence it may be termed a silver digging, and so of other metals. Likewise the right of digging for stone, chalk, sand, and turbary and such like. Likewise a right of common, and not of herbage, as the right of mowing grass or heather or such like for reasonable estovers. Likewise in the same manner for cutting in another person's wood for reasonable estovers for building, enclosing and burning.

3. How a common is lost when it has once been acquired. f. 223.

Let us see now how a person can lose seysine of common of pasture, when it has once been acquired. And it is to be known, that it may be lost voluntarily, in the same manner in which it has been acquired by mutual willingness and consent, in the same manner it may be dissolved by the mutual willingness of the parties, if they wish to dissent by a renunciation out of common willingness, and by a release and a quit-claim; and it is not sufficient if one of them only wishes to release and to resile unless both consent to it, for nothing

conveniens est &c. Et ita sicut acquiritur per communem consensum, ita amittitur per communem dissensum. Item sicut acquiritur sine constitutione & consensu per patientiam & usum, licet patientia trahatur ad consensum, ita amitti potest per negligentiam & non usum, imperpetuum vel ad tempus. Imperpetuum, ut si tempus excludat omnem actionem tam super possessione, quàm super proprietate, vel sicut imperpetuum, ut excludat assisam super possessione & non super jure, quia assisa infrà certum tempus limitatur, & sic tempus tollit omnem actionem vel aliquam. Item amitti potest ad tempus contra voluntatem, ut si quis ita negligens fuerit quòd seysinam suam sine brevi & sine judicio resumere non possit. Diligens enim debet quilibet esset[1] in utendo, cùm negligentia sicut violentia ei possit esse damnosa, ut si hodie repulsus fuerit per vim, in crastino si possit immittat averia sua & utatur, & sic de die in diem, & sic non amittet seysinam propter diligentiam, licet illam habeat contentiosam. Si autem omninò per vim repellatur cui resisti non possit, vel saltem omninò non repellatur, sed quòd commodè uti non possit nec per modum constitutionis servitutis: statim recurrendum est ad illum qui jura tuetur, & habebit remedium per assisam, quæ super hoc prodita est recuperandæ possessionis gratia, per breve quod tale est. Commodè dico, ut si fiat aliquid in alieno ad nocumentum servitutis, per quod omninò uti non possit vel non commodè, ut si quis murum vel hayam fecerit, statim demoliantur, vel post tempus per assisam. Item si transferri debet communia ad alium, oportet quòd transferatur ad certas psonas, & à certis psonis & à certis teñtis, usq; ad certa

[1] "esse," MS. Rawl. C. 160.

is so convenient, &c. And thus as it is acquired through common consent, so it is lost through common dissent. Likewise as it is acquired without an appointment and consent by sufferance and use, although sufferance is taken for consent, so it may be lost through negligence and non-user, in perpetuity or for a time. In perpetuity, as if the time should exclude every kind of action as well about the possession as about the property, or as it were in perpetuity, as if it should exclude an assise about the possession and not about the right, because an assise is limited within a certain time, and so time takes away every kind of action or some. Likewise it may be lost for a time unwillingly, as if any one has been so negligent that he cannot resume his seysine without a writ and without a judgment. For every one ought to be diligent in using a thing, since neglect just as violence may be damaging to him, as if he has been repelled by force to-day, he should send in to-morrow his cattle, if he can, and make use [of the pasture], and so from day to day, and so he shall not lose his seysine on account of his diligence, although he may have a contentious seysine. But if he be altogether repelled by force, which he cannot resist, or if not altogether repelled, is at least repelled so that he cannot use it advantageously, nor in the manner of the appointment of the servitude, he must forthwith have recourse to him, who is the protector of rights, and he shall have a remedy by an assise, which has been set forth for the sake of recovering possession, by a writ, which is of this kind. I have said "advantageously," as if anything be done on another person's ground by way of nuisance to the servitude, whereby he cannot use it at all or not advantageously, as if a person shall have made a wall or a hedge, let them be at once demolished, or after a time by an assise. Likewise if a right of common ought to be transferred to another, it is incumbent that it be transferred to certain persons and from certain persons, and from certain tenements to

tenemẽta, quibus servitus debeť: quia hujusmodi jura sine corporibus esse nō poterunt, scilicet sine corporibus quæ serviant, & sine corporibus quibus serviť. Et quia incorporalia traditionem non patiuntur, nec possideri possunt sed quasi, ita nec transferri possunt sed quasi. Et sufficit pro traditione aspectus loci, in quo hujusmodi jura constituuntur, & mutua voluntas contrahentium & effectus possidendi, & ex sola voluntate & effectu est quis quasi in possessione: & licet statim non fuerit usus, tamen semper utitur vel quasi, donec per non usum scilicet per vim, per negligentiam, vel per longam patientiam amittat seysinam: ut si ille, qui hujusmodi servitutem alicui concesserit, aliquam partem pasturæ suæ appropriaverit vel totam, & ille, cui conceditur, omnino teneatur extra, sive ante ea[1] pecora sua immiserit sive non, facit disseysinam. Si autem ille cui servitus conceditur viribus concedentis possit resistere, statim cùm herba pullulare inceperit, averia sua immittat & pascat, sive ante usus fuerit sive non, & sic per usum retinebit servitutem, etiam per unicum averium vel per duo: licet non tot immittat, quot immittere posset vel deberet. Et quid si nullum omninò habuerit averium proprium, sufficit si nomine suo immittat alienum, & hoc nisi modus & con-
f. 223 b. stitutio servitutis se habeat in contrarium, scilicet quòd immittere non possit nisi dominicum. Et quid si non habuerit nec proprium nec alienum, tunc sufficit (ut videtur) quòd in quantum possit resistat, & denunciet cultori opus novum, scilicet quòd excolere non sit ei licitum, & sic facta contentione, & re effecta litigiosa, immittere poterit cùm voluerit, licet blada sint ma-

[1] "antea," MS. Rawl. C. 160.

certain tenements to which the servitude is due; because rights of this kind cannot exist without bodies, to wit, without bodies which serve, and without bodies to which the service is done. And because incorporeal things do not admit of delivery, nor can be possessed, but by a fiction, so they cannot be transferred except by a fiction. And the sight of the place, in which rights of this kind are appointed, and the mutual willingness of the contracting parties, and the effect of taking possession, suffice for delivery, and a person is as it were placed in possession by the sole willingness and intention of the parties; and although he has not forthwith used it, nevertheless he always uses it or is supposed to do so, until by non-user for instance, by violence, by negligence, or by long sufferance he loses the seysine; as if he who has granted to any one a servitude of this kind, has appropriated to himself some part of the pasture or the whole, and he to whom it is granted is kept altogether out of it, whether he has previously sent in his sheep or not, he causes a disseysine. But if he, to whom the servitude is granted, can resist the force of the grantor, as soon as the grass begins to grow, let him send in and pasture his cattle, whether he has done so before or not, and so by user he will retain the servitude even through a single beast or through two, although he does not turn in as many as he can, or as he is entitled to do. And what, if he have no beast of his own, it is sufficient if he turns in another person's beast in his own name, and this unless the mode and appointment of the servitude is to the contrary, namely that he cannot turn in any beast except of his own demesne. And what if he has no beast of his own nor of another person's, then it is sufficient (as it seems) that he resists as much as possible, and denounces to the cultivator his new work, to wit, that it is not allowed to him to cultivate it, and so having raised a dispute, and the matter having been made litigious, he can turn in his beasts when he pleases, although f. 223 b.

tura. Si autem tam negligens extiterit, quòd statim averia non immiserit, nec alio modo contentionem apposuerit, amittere possit servitutem & seysinam per talem negligentiam. Et unde si cùm blada matura fuerint,[1] vel cùm spicas emiserit, vel naturam herbæ mutaverit, averia tunc primò immiserit vel contentionem fecerit, faciet domino fundi disseysinam de tenemento suo, & ita quòd dominus fundi recuperare poterit tenementum suum liberum propter usurpationem, & alius amittet assisam de communia pasturæ, vix audiendus imposterum super proprietate, & hoc propter negligentiam sive impotentiam, cum magna negligentia trahatur ad consensum. Sed videtur contrarium. Esto quòd quis alienum excolat tenementum, & dominus tenementi sciens & prudens dissimulaverit quousque blada matura fuerint, non priùs fit ei disseysina propter culturam, quàm si blada asportata fuerunt à cultore, sed cùm per tantum tempus dissimulaverit (ut supra dictum est de communia) quousque blada matura fuerint, quare non amittit ille seysinam suam per negligentem patientiam, sicut ille (ut supra) pasturam in communia pasturæ? Ad quod sciendum, quòd est negligens patientia & patiens cautela, nec fit ei in aliquo disseysina per culturam cùm hoc velit, & quia per hoc semper melioratur conditio, nisi cùm ille cultor blada asportaverit, quòd quidem non est in pastura, quia non melioratur conditio ex quo per patientiam facit illa non blada sua, quia in uno casu melioratur conditio tenentis per patientiam, quoad bladum habendum, in alio deterioratur, quia ex cultura deterioratur pastura. Ex patientia enim quandoque patiens melio-

[1] "fuerit," MS. Rawl. C. 160.

the corn is ripe. But if he has been so negligent, that he has not forthwith turned in any beasts, nor in any other way raised a dispute, he may lose the servitude and the seysine through such negligence. And hence, if when the corn is ripe or when it has put forth ears, or has changed its character of herbage, he has then for the first time turned in his cattle or raised a dispute, he will cause to the lord of the ground a disseysine from his tenement, and so that the lord of the ground may recover his free tenement on account of the usurpation, and the other shall lose his assise of common of pasturage, hardly to be heard hereafter upon the question of property, and this on account of his negligence or powerlessness, since great negligence is taken for consent. But there seems to be a contrary view. Let it be that some one cultivates another person's tenement, and the lord of the tenement knowingly and designedly dissembles until the corn is ripe, no disseysine on account of the cultivation is put into effect against him before the corn is being carried away by the cultivator, but since he has dissembled for so long a time (as above said in a case of common of pasture) until the grain is ripe, why does he not lose his seysine through his neglectful sufferance, as he has lost (as above said) his pasturage in his common of pasture? Upon which it is to be known, that there is a negligent sufferance and a patient cautiousness, nor is a disseysine in any respect worked against him by cultivation, when he is willing, and because that thereby his condition is always improved, until when the cultivator is carrying away the grain, which is not an act of pasturage, because his condition is not improved from the time when he by his patience makes that grain not to be his own, because in one case the condition of the tenant is ameliorated by his patience, as regards the having the grain, in the other it is deteriorated, because the pasture is deteriorated by the tillage. For by his sufferance sometimes a patient person makes

rem facit suam conditionem, quandoque deteriorem, & quamdiu fecit injuriam suam ex mea voluntate, patientia non currit contra me, quòd si contra, aliud est.

4. De impetratione brevis de communia pasturæ, cum quis fuerit disseysitus.

Si quis igitur injustè disseysitus fuerit & per vim de communia pasturæ suæ, sive impediatur quo minus commodè & modo debito uti possit, & secundùm quòd se habet ad ea quæ edi possunt, vel secundùm quòd largè se habeat ad alia quæ sunt ad utilitatem, si statim se non reposuerit in seysinam cùm possit per negligentiam, vel cùm non possit propter violentiam & vim majorem, statim recurrendum est ad illum qui jura tuetur, ad impetrandum assisam quæ prodita est recuperandæ possessionis gratia. Sed videndum est qualiter sit impetrandum. Plures enim possunt constitui servitutes in uno fundo pluribus et per totum sicut uni. Et plures ibi possunt esse servitutes, licet fundus unus, tamen ratione diversorum tenementorum ad quæ pertinent, cum ratione diversarum personarum quibus servitutes debentur: et quia plures personæ et f. 224. diversa tenementa, et sic diversa jura, ideo diversæ et plures disseysinæ et plura brevia. Et quia plures habere possunt jus pascendi in uno tenemento, non fiat unum breve ratione tenementi in quo servitus Britton, l. ii. ch. xxv. § 2. constituitur, quòd unum est, sed plura. Si autem tenementum, ad quod communia pertinere dicitur, commune sit inter plures, sicut inter cohæredes sive participes, sive omnes disseysiti fuerint sive quidam illorum, una erit disseysina, et non plures, propter unicum jus, quamvis plurium personarum, et propter unicum tenementum ante divisionem. Item si tenementum in quo communia conceditur commune sit pluribus participibus hæredibus vel vicinis, et unus eorum disseysi-

his condition better, sometimes worse, and as long as he has worked an injury in accordance with my will, my sufferance does not tell against me, but if contrariwise, it is different.

4. Concerning the suing out a writ of common of pasture, when a person has been disseysed.

If any one therefore has been disseysed unjustly and by violence of a common right of pasture, or is impeded from enjoying it conveniently and in a due manner, according to what regards the things which may be eaten, or according to what regards largely other things which may be useful, if he has not at once replaced himself in seysine when he can through neglect, or when he cannot on account of violence and greater power, recourse must be had at once to him who protects rights to sue out an assise, which has been handed down for the sake of recovering possession. But we must see in what way it is to be sued out. For several servitudes may be appointed in one ground for several persons and throughout the whole, just as for one person. And there may be there several servitudes, although only one ground, nevertheless by reason of divers tenements to which they appertain, as well as by reason of divers persons to whom the servitudes are due, and because there are several persons and divers tenements, and so divers rights, accordingly there are divers and several disseysines and several writs. And because several persons may have a right of pasturage in one tenement, let there not be one writ only by reason of the tenement, in which the servitude is appointed, because it is one, but several writs. But if the tenement, to which the right of common is said to pertain, be common amongst several persons, as between coheirs or coparceners, whether all have been disseysed or some of them, there will be one disseysine and not several, on account of the single right, although of several persons, and on account of the single tenement before division. Likewise if the tenement in which a right of common is granted be common to several parceners, heirs or neighbours, and one of them has caused a disseysine, f. 224.

nam fecerit, non erit propter hoc super omnes impetrandum, sed super illum tantum qui fecit injuriam, nisi omnes vel quidam illorum ante impetrationem hoc expressè advocaverint. Si autem hoc advocaverint post impetrationem ante captionem assisæ, etiam si in brevi non nominentur, bene se poterunt gratis ponere in assisam ac si nominarentur, ut ita terminetur negotium versus omnes, quòd si facere noluerint, nihilominùs procedet assisa versus eum qui disseysivit. Et si querēs per assisam recuperaverit, recuperabit & retinebit versus omnes: quia si postea velint participes eum iterū disseysire & impetraverit super eos, etiam sine jurata recuperabit per primam assisam, quia non est assisa capienda super assisam de eadem re, ne secunda sit contraria primæ, quia sic possent judicia esse in incerto.

5. De officio vicecomitis.

Facta autem sic impetratione, statim & sine mora erit vicecomes requirendus. Officium autem vicecomitis est, plegios accipere (ut supra) de nova disseysina. Item in præsentia partium debet duodecim eligere, si præsentes esse velint, qui statim communiam pasturæ & locum in quo petitur communia videant, & etiam tenementum ad quod communia pertinere dicitur. Tenementum videlicet in quo communia pasturæ petitur, qualitatem & quantitatem, & per quas metas, & diligenter debent inquirere juratores de modo disseysinæ, scilicet utrum omninò expellatur, vel impediatur quò miuùs commodè uti possit. Item quo tempore debeatur, & de genere & numero averiorum, ut inde possunt certificare justitiariis, cùm fuerint requisiti. Item tenementum videre debent ad quod communia pasturæ pertinere dicitur, quia nemo potest commu-

Britton, l. ii. ch. xxv. § 3.

a writ is not to be sued out on that account against all, but against him only, who has done the injury, unless all or some of them before the suing out have expressly avowed it. But if they have avowed it after the suing out, before the taking of the assise, even if they are not named in the writ, they may put themselves gratuitously on the assise, just as if they had been named, that so the business may be terminated against all, but if they have been unwilling to do so, nevertheless the assise shall proceed against him who has caused the disseysine. And if the complainant has recovered by the assise, he shall recover and retain against all; because if afterwards the parceners wish to disseyse him a second time, and he has sued out a writ against them, he shall recover even without a jury through the first assise, because an assise is not to be taken upon an assise concerning the same thing, lest the second should be contrary to the first, for so judgments would be in uncertainty.

5. Concerning the office of the viscount.

But a writ having been thus sued out, the viscount is forthwith and without delay to be applied to. But the office of the viscount is to accept sureties (as above said) concerning novel disseysine. Likewise in the presence of the parties he ought to choose twelve persons, if they are willing to be present, who shall immediately view the common right of pasture and the place in which the common right is claimed, and also the tenement to which the common right is said to pertain. The tenement for instance in which the common right of pasture is claimed, the quality and the quantity and by what metes, and the jurors ought to inquire diligently concerning the mode of disseysine, whether he has been expelled altogether or impeded from using it conveniently. And at what time it is due, and concerning the kind and the number of the cattle, that they may be able to certify the justices thereupon, when they shall be required. Likewise they ought to view the tenement, to which the common of pasture is said to pertain, because no person can claim a common

niam pasturæ clamare ut pertinentem ad liberum tenementum suum, nisi ille qui liberum tenementum habet. Liberum autem dicitur, ad differentiam villenagii & villanorum qui tenēt villenagium: quia non habent actionem nec assisam, sed dominus cujus liberum tenementum villenagium fuerit. Item quòd sit suum & non alienum, hoc est si teneat nomine alieno ut firmarius & ad terminum, vel sicut creditor ad vadium. Ideo autem videre debent locum in quo pastura petitur: quia illud jus pascendi videri non potest, & incongruè quæritur quot acras communiæ pasturæ petat, cùm quæri debeat in quot acris.

6. Forma brevis de communia pasturæ.

Rex vicecomiti salutem. Questus est nobis A. q̄ B. injustè & sine judicio disseysivit eum de cōmunia pasturæ suæ in tali villa, quæ pertinet ad liberum tenẽtum suum in eadem villa, vel in alia villa tali. Et ideò tibi præcipimus, q̄ si talis fecerit te securum f. 224 b. &c. ut supra. Et interim facias duodecim liberos & legales homines videre tenementum illud, & pasturam illam, & summoneas talem &c. ut supra.

7. De intentione querentis proponenda.

Britton, l. ii. ch. xxv. § 5.

Proposita igitur intentione sua secundùm formam brevis, oportet eam fundare sic, & primò confirmet personam suam, & postea docere oportet eum rationē, qua p̄tineat ad tenementum suum, ut si dicat q̄ communia p̄tinet ad liberum tenementum suum, quia feoffatus fuit de tali tenemento cum communia pasturæ ad tot averia, sicut perpendi poterit supra de causis, quare communia p̄tineat ad tenementum. Item oportet eum docere de qualitate pasturæ, utrum sit larga vel stricta, ut certa res deducatur in judicium. Item

right of pasture as pertaining to his free tenement, except the person who has the free tenement. But it is termed free to distinguish it from a villenage, and from villeins who hold a villenage, because they have not a right of action nor an assise, but the lord has, whose free tenement the villenage may be. Likewise that it is his own and not another's, that is, if he holds it in the name of another, as a farmer or for a term, or as a creditor for a pledge. But they ought on this account to see the place in which the pasture is claimed, because the right itself of pasture cannot be viewed, and it is incongruously inquired how many acres of a common right of pasture does he claim, when it ought to be inquired in how many acres.

6. The form of a writ concerning a common right of pasture. f. 224 b.

The king to the viscount greeting. A. has complained to us that B. unjustly and without a judgment has disseysed him from a common right of pasturage in such a vill, which pertains to his free tenement in the same vill, or in another such vill, and accordingly we enjoin you, that if so-and-so has given security, &c., as above. And meanwhile cause twelve free and loyal men to view that tenement and that pasturage, &c., as above.

7. Of propounding the declaration of the complainant.

His declaration having been propounded in accordance with the form of the writ, it behoves the complainant to substantiate it thus, and let him in the first place establish his personality, and afterwards it behoves him to show the reason wherefore it belongs to his tenement, as if he should say that the right of common pertains to his free tenement, because he was enfeoffed of such a tenement with a common right of pasturage for so many cattle, as may be understood from the treatment above of the causes, wherefore a right of common belongs to a tenement. Likewise he must state concerning the quality of the pasturage whether it be large or restricted, that a certain thing shall be brought under judgment. Likewise by reason of what tene-

de quo tenemento ꝑtineat & ad quale teñtum. Et eodē modo de tempore, genere, numero, & modo: secundùm quòd supra dictum est. Et si aliquando fuit ampla, vel larga, si postmodum fuerit coarctata, vel restricta. Coarctari verò poterit & restringi (secundùm quod ex præmissis perpendi poterit), ut si constituatur per totum fundum & ubiq;, coarctari potest ad certum locum. Eodē modo si omni tempore, coarctari potest ad certum tempus: & ita de aliis.

8. De exceptionibus contra querentem.

Fundata igitur tali modo intentione querentis, multipliciter excipi poterit contra querentem, vel quia ad alium ꝑtineat querela, & non ipsum, vel alio modo, ut supra dictum est in assisa novæ disseysinæ pleniùs. Item excipere poterit ille de quo queritur ex ꝑsona sua ꝓpria, ut supra in eodem de eodem. Item excipi poterit quòd non disseysivit, quia nunquam fuit in seysina ut supra. Item de hoc quòd dicit de communia pasturæ suæ, excipi poterit, quòd communiam ibi habere non possit, ut infrà dicetur, cùm excipiatur contra assisam. Item excipi poterit contra breve propter errorem: ut supra pleniùs. Item contra judicem ut supra. Item contra ꝑsonam querentis (ut supra) sicut de questione status: excepto eo, quòd si uxor libera copulata villano assisam arramaverit de communia pasturæ ꝑtinentē ad liberum tenementū suū, cùm villanus sit extra potestatem domini sui in libero tenemento, recuperare debet seysinam non obstante exceptione villenagii à quocunq; ꝓposita, saltem donec villanus ad villanum convincatur, & in servitutem redigatur. Nec etiam tunc erit licitum domino se

Britton, l. ii. ch. xxvi. § 1.

ment it is claimed, and to what sort of tenement it attaches. And in the same way concerning time, kind, number, and mode, according to what has been said above. And if it has been at any time ample and large, if it has been afterwards narrowed or restricted. But it can be narrowed and restricted, (according to what may be understood from the premises,) as if it were appointed over the whole ground and everywhere, it may be narrowed to a certain place. In the same way if at all times, it may be narrowed to a certain time, and so in other matters.

8. Of exceptions against the complainant.

The statement of the complainant having been in this manner substantiated, manifold exceptions may be taken against the complainant, either because the complaint belongs to another and not to him, or in another way, as has been said above more fully in an assise of novel disseysine. Likewise the person against whom the complaint is brought may except on his own person, as above in the same concerning the same. Likewise it may excepted that he has not disseysed him, because he was never in seysine, as above. Likewise concerning this which he calls a common right of pasturage, it may be excepted that he cannot have a common right there, as will be explained below, when an exception is taken to the assise. Likewise an exception may be taken against the writ on account of an error, as has been discussed above more fully. Likewise against the judge, as discussed above. Likewise against the person of the complainant (as above) on a question of *status*, with this exception, that if a free wife coupled to a villein has instituted an assise concerning a common right of pasture pertaining to her free tenement, since the villein is beyond the power of his lord in the free tenement, she ought to recover her seysine notwithstanding the exception of villenage propounded by any one, at least until the villein has been convicted as a villein, and has been reduced into serfage. Nor even then will it be allowable for the lord

ponere in tenementum mulieris, cùm hoc non sit liberum & proprium tenementum villani, quòd si fecerit, recuperabit villanus & uxor p assisam, non obstante exceptione villenagii: quia nulli competit hujusmodi exceptio, nec etiam ipsi dño. Et unde cùm aliquandò ꝑposita esset exceptio villenagii cōtra villanum & uxorem liberā petentes per assisam communiam pasturæ ut pertinentem ad liberum tenementū ipsorum, sed tamen cùm in fine fuerit adjudicatum, quòd cōmunia pasturæ libero tenemento adjungeretur, tanquam accessorium principali, & sic factum est per officium judicis, quod fieri debuit jure actionis. Cùm igitur proposita sit hujusmodi exceptio contra personas querentium, videri debet an competat tenenti vel non, ut supra. Si autem competat, oportet quòd tenens illam probet. Et eodem modo oporteret querentem probare intentionem suam, si nulla ab initio proposita esset exceptio: & secundùm quod dictum est, probare debet tenens
f. 225. exceptionem, nisi querens replicando docere possit illam esse vacuam, vel omninò nullam.

9. De exceptionibus contra assisam secundum articulos brevis.

Cùm autem nihil sit, quod excipi possit contra justiciarios, nec personam querentis, nec contra breve, tunc primò dicatur & excipiatur contra assisam secundùm articulos brevis, & secundùm formam. Continetur enim in brevi sic, scilicet si talis injustè & sine judicio &c. Et inde (hoc ut supra). Poterit quis esse in seysina licet non statim utatur, & nomine alieno sicut nomine proprio vel alieno: sicut clericus nomine ecclesiæ suæ: qui cùm fuerit institutus, & invenerit ecclesiam in seysina, quæ nunquam fuit disseysita, statim

to put himself into possession of the tenement of the woman, since this is not a free and proper tenement of the villein, which if he should do, the villein and his wife will recover by an assise notwithstanding the exception of villenage, for no one is entitled to this kind of exception, not even the lord himself. And hence when an exception has been sometimes propounded against a villein and his free wife claiming by an assise a common right of pasturage as pertaining to their free tenement, but nevertheless when it has been in the end adjudged that the common right of pasturage is annexed to the free tenement, as being accessory to the principal, and so it has been done through the office of the judge, which ought to have been done by right of action. When therefore this kind of exception has been propounded against the persons of the complainants, it ought to be considered whether the tenant is entitled to raise it or not, as above. But if he should be entitled, it is incumbent that the tenant should prove it, and in the same way it would be incumbent that the complainant should prove his declaration, if on exception has been propounded at the commencement, and according to what has been said, the tenant ought to prove his exception, unless the claimant in his replication can show that it is empty, or altogether null. f. 225.

9. Of exceptions against the assise, according to the articles of the writ.

But when there is no exception that can be taken against the justices, nor against the person of the complainant, nor against the writ, then let it first be stated and excepted against the assise according to the articles of the writ, and according to its form. For it is contained in the writ thus, to wit, if such a person unjustly and without a judgment, &c. And thereupon as above. A person may be in seysine, although he does not forthwith use it, and in another's name as in his own name or in that of another, as a clerk in the name of his church, who when he has once been instituted and has found his church in seysine, which never was disseysed, he is forthwith in seysine, although he may not forth-

est in seysina, licet non statim utatur. Et si tunc fuerit disseysitus, potest recuperare per assisam. Item disseysivit, ad quod excipiatur quòd nunquam fuit in seysina, & ideò quòd nunquam disseysiri potuit. Videndum erit ex qua causa dicat communiam pasturæ pertinere ad liberum tenementum suum, ut si ex causa donationis, & sic convenerit inter donatorem & donatarium, & quòd donator habeat animum donandi, & donatarius animum possidendi, & donatarius sic per se vel procuratorem juducatur[1] in seysinam, quod tenementum videat, in quo communia conceditur, hoc sufficit pro traditione, & statim est in seysina per affectum & per aspectum, vel quasi, licet non statim pecora immittat. Et semper videtur uti voluntate, & animo civiliter, & præsentia & aspectu naturaliter, donec amiserit per non usum. Si autem petat quis communiam, ut pertinentem ad liberum tenementum suum ex causa successionis, tunc primò videndum erit utrum antecessor suus obiit inde seysitus, vel non, ut si ante mortem suam fuit inde disseysitus: & tunc refert quando. Si autem inde seysitus obiit, tunc statim incipit hæres suus habere eandem seysinam quàm antecessor suus habuit cùm seysitus fuit de hæreditate, quæ est quasi principale, & corporale, & sic de accessorio, sicut de jure pascendi & communia, quod est incorporale, quod ex solo animo acquiritur & voluntate possidendi; & licet statim verè non utatur per immissionem pecorum, utitur tamen vel quasi ut supra. Et si postea prohibeatur immittere, competit ei assisa novæ disseysinæ. Ad alium tamen transferri non potest communia per se ante verum usum, nisi hoc fortè sit cum corpore, s. cum teñto, ad quod pertinuerit, sed non cum tenemento in quo communia fuerit, sed cum

Britton, l. ii. ch. xxvi. § 2.

[1] "inducatur," MS. Rawl. C. 160.

with use it. And if he be then disseysed, he may recover by an assise. Likewise he has disseysed, to which it may be excepted that he was never in seysine, and accordingly that he could never be disseysed. It must be considered therefore from what cause he may say that a common right of pasture pertains to his free tenement, as if it be by reason of donation, and it has been so agreed upon between the donor and the donatary, and that the donor had the intention to give, and the donatary the intention to possess, and the donatary thus by himself or his agent has been inducted into seysine that he may see the tenement, in which the common right is granted, this suffices for delivery, and he is forthwith in seysine by intention and by view, or as it were so, although he does not at once send in his cattle. And he always seems to use his will and intention civilly, and his presence and view naturally, until he has lost it by non-user. But if a person claims a right of common as pertaining to his free tenement by reason of succession, then it must first be seen whether his ancestor died seysed thereof or not, as if he has been disseysed thereof before his death, and then it is importance, when? But if he died seysed thereof, then his heir forthwith begins to have the same seysine, which his ancestor had when he was seysed of the inheritance, which is as it were the principal and corporeal thing, and so of the accessory, as of the right of pasture and the right of common, which is incorporeal, which is acquired by the intention alone and the will of possessing.; and although he should not at once use it truly by the sending in of sheep, he uses it however, or as it were uses it, as above said. And if he be afterwards hindered from sending in sheep, he is entitled to an assise of novel disseysine. But a right of common by itself cannot be transferred to an another before a true use of it, unless by chance it be with the body, that is with the tenement to which it pertains, but not with the tenement in which the right

servitute illa. Et si fortè post mortem antecessoris statim uti voluerit, & fortè prohibitus fuerit vel impeditus, si recenter ante mortem, adhuc retinet seysinam civiliter, licet seysinam pacificam non habuerit, sed cum difficultate, nihilominùs tamen per talem usum retinet sibi seysinam, donec omninò prohibitus fuerit, quòd uti non possit: quo casu tunc primò ad superiorem erit recurrendum, ut supra. Si autem seysitus non obierit, tunc refert utrum longè ante mortem suam disseysitus fuerit, ita quod sibi perquisivisse potuit per assisam, quod quidem non fecit per negligentiam. Quo casu, hæredi non succurritur per assisam, quia audiri non potest hæres propter negligentiam antecessoris, nisi super proprietate, quia vigilantibus &c., & sic incurrit quis damnum (sine culpa sua) per alterius defectum. Si autem non longè ante mortem suā, & ita quòd sibi perquirere non potuit, vel in lan-
f. 225 b. guore in quo obiit, & semper existens in voluntate retinendi, vel sibi perquirendi si posset, semper fingitur esse in possessione, & mori seysitus: eo quòd semper sibi civilem retinuit possessionem: & unde eandem transmittit ad hæredem: & ex ea uti potest hæres, nisi prohibeatur: & si prohibitus fuerit quòd ingredi omninò non possit, habebit assisam mortis antecessoris, vel aliud breve loco assisæ mortis antecessoris, vel novæ disseysinæ secundùm quod elegerit, sed sive longè ante mortem sive non longè fuerit antecessor disseysitus, & sibi perquisivit in vita per breve, & ita quòd visus terræ factus fuerit per juratores &c. per talem impetrationem amisisse videbatur utramque possessionem, civilem videlicet, & naturalem: & sic nullam seysinam transmittere potuit ad hære-

of common is, but with that service. And if by chance after the death he has wished forthwith to use it, and by chance has been prohibited or impeded, if recently so before his death, he still retains the seysine civilly, although he has not a peaceful seysine, but with difficulty, nevertheless by such use he retains for himself the seysine, until he has been altogether prohibited from it so as not to be able to use it, in which case he must then for the first time have recourse to a superior, as above. But if he has not died seysed of it, then it is of importance whether he was disseysed long before his death, so that he could have claimed it by an assise, which he has not done from neglect. In which case the heir is not aided by an assise, because the heir cannot be heard on account of the negligence of the ancestor, except on the question of property, because the vigilant only, &c., and thus a person incurs loss without fault of his own through the failure of another. But if not long before his death, and so that he could not have claimed it by an assise, or in the sickness through which he died and always cherishing the intention of retaining it, or of claiming it if he could, he is held by a fiction to be in possession, and to die seysed of it, inasmuch as he has always retained civil possession of it, and hence he transmits the same to his heirs, and thereupon the heir may use it, unless he be prohibited, and if he be prohibited, that he cannot in any way enter upon it, he shall have an assise of the death of an ancestor, or another writ in the place of an assise of the death of an ancestor, or of novel disseysine according as he made choice ; but whether his ancestor has been disseysed a long time, or not a long time before his death, and he has claimed it by a writ in his lifetime, and so that a view of the ground has been made by the jurors, &c., by such a suing [of a writ] he seems to have lost both kinds of possession, the civil for instance and the natural, and so he could not transmit to his heir any seysine. f. 225 b.

dem. Actionem tamen transmittit per hoc quòd sibi acquisivit quasi de nova disseysina per breve de ingressu, sed non quoad pœnam disseysinæ, sed quoad restitutionem, secundùm quod nova disseysina duplex est, ut supra. Aboletur enim injuria per mortem ejus qui fecit injuriam, & similiter per mortem ejus, cui fit: & sic aboletur pœna, quia extinguitur injuria cum persona, ut infrà de ingressibus post disseysinam per mortem principalium pleniùs. Item continetur de communia pasturæ suæ quæ pertinet ad liberum tenementum suum, & ex hoc datur exceptio tenenti: de communia verò qualis esse debeat, satis elici poterit ex præcedentibus. Item quæ pertinet &c.

10. De exceptionibus contra assisam. Britton, l. ii. ch. xxvi. § 3.

Dicere enim poterit tenens & excipere multis modis, scilicet quòd tenementum in quo communia petitur & tenementum ad quod communia dicitur pertinere sunt de diversis baroniis, & diversis feodis, & feodum in quo communia petitur liberum est & alteri feodo nullam debet servitutem, nec unquam habuit ibi talem communiam, nec jus pascendi ex aliqua constitutione, vel aliquo usu, nec pro servitio, nec pro vicinitate, & si unquam usum habuit vel seysinam, nunquam aliquam habuit nisi contentiosam, & per vadii captionem, & ad emendationem damni. Quo casu, querens (si possit) doceat contrarium per assisam. Item dicere potest, quòd, si aliquam seysinam habuit, illam habuit per vim, vel clam, vel precario, quo casu querens (si possit) doceat contrarium per assisam. Item dicere possit tenens quòd tenementum ad quod communia dicitur pertinere suum est, & nō querentis, quo casu, nisi querens doceat contrarium, cadit assisa: ut de termino Paschæ anno

Britton, *ib.*

He transmits, however, a right of action for what he has acquired as it were after a novel disseysine by a writ of entry, but not as regards the penalty of the disseysine, but as regards restitution, according as novel disseysine has two aspects, as above stated. For the injury is wiped away by the death of him who has done the injury, and in a similar way by the death of him to whom it is done, and thus the penalty is wiped away, because the injury is extinguished with the person, as below concerning entries after a disseysine through the death of the principal parties more fully. Likewise it is contained in his common right of pasturage which pertains to his free tenement, and upon this an exception is given to the tenant, but concerning a common right what it ought to be, may be sufficiently understood from what has preceded. Likewise what appertains, &c.

10. Of exceptions against the assise.

For the tenant may say and except in many ways, to wit, that the tenement in which the common right is claimed and the tenement to which the common right is said to appertain are in different baronies, and in different fiefs, and the fief in which the common right is claimed is free, and owes no service to the other fief, nor did [the claimant] ever have any such common right there, nor a right of pasturage from any appointment or from any user, nor on account of a service nor on account of neighbourhood, and if he ever had any use and seysine of it, he never had any other except what was matter of dispute, and through security taken for making good the trespass. In which case the claimant (if he can) must show the contrary by the assise. Likewise he may say that if he had any seysine, he had it by violence, or clandestinely, or precariously, in which case the claimant must show the contrary by the assise. Likewise the tenant may say that the tenement, to which the common right is said to pertain, is his own, and not that of the claimant, in which case, unless the claimant prove the contrary, the

regis Henrici 13, in comitaī Notthing. de Radulpho filio Petri, ubi dictum fuit Radulpho, quòd sibi perquireret per aliud breve. Item poterit tenens respondere contra assisam quòd querens nullam communiam clamare potuit in tali loco, quia tenementum illud est suum separale, & quòd illud includere possit & excolere pro voluntate sua, & inclusum habere omni tempore.

11. Contra exceptionem replicatio.

Ad quod querens (si possit) doceat contrarium vel diversum per assisam, scilicet quòd nullo tempore includi poterit, vel quòd non nisi certis horis, & temporibus. Item respondere potest tenens & dicere quòd ille qui queritur nullum omninò habet tenementum liberum, vel quasi, ad quod aliqua communia pertinere possit vel etiam mansiunculam. Item dicere potest quòd nulla communia pertinet ad tale tenementum: quia f. 226. illud fuit aliquando foresta, boscus, & locus vastæ solitudinis & communia, & jam inde efficitur assartum, vel redactum est in culturam, & non debet communia pertinere ad communiam, & ubi omnes de patria soleBritton, *ib.* 4. bant communicare. Ad hoc facit de itinere W. de Ralegh in comitatu Warř, assisa novæ disseysinæ de communia pasturæ, si Augustinus &c. Eodem modo dici poterit de mariscis, & aliis vastitatibus in culturam redactis, quia ubi eadem ratio, ibi esse debet idem jus. Item dicere potest tenens contra assisam, quòd principalis disseysitor mortuus fuit ante impetrationem brevis, vel ante captionem assisæ. Ut de termino S. Trinitatis anno regis Henrici duodecimo, de itinere Midd', si S. Cantuariensis[1] archiepiscopus & alii plures. Sed quid dicetur si assīsa capta sit in vita principalis disseysitoris, qui ante judicium redditum, moriatur? Videtur propter hoc quòd judicium remanere non debeat. Item dici poterit contra assisam quòd

[1] "S. Cantuariensis." Stephen Langton was archbishop from A.D. 1216 to 1228.

assise fails, as in the thirteenth year of king Henry, in the county of Nottingham, concerning Ralph the son of Peter, where it was said to Ralph that he must claim it by another writ. Likewise the tenant may reply to the assise, that the claimant can claim no right of common in such a place, because the tenement is his own several property, and that he may enclose it and cultivate it at his pleasure, and have it enclosed at all times.

11. A replication to the exception.

To which the claimant (if he can) should prove the contrary, or a diverse fact by the assise, to wit, that at no time could it be enclosed, or not except at certain hours and times. Likewise the tenant may answer and say that he who complains has no free tenement at all or as it were, to which any right of common can appertain, or even a cottage. Likewise he may say that no right of common appertains to such a tenement, because it was sometime a forest, a wood, and a place of waste solitude and a common, and now it has been cleared and reduced into cultivation, and a common cannot appertain to a common, where all the people of the country were accustomed to meet in common. This is supported by the iter of William de Ralegh in the county of Warwick, an assise of novel disseysine concerning common of pasturage, if Augustinus, &c. The same thing may be said of marshes and other wastes reduced into cultivation, because where there is the same reason, there the same right should prevail. Likewise the tenant may say against the assise, that the principal disseysor has died before the suing out of the writ, or before the holding of the assise. As in Holy Trinity term in the twelfth year of king Henry, in the iter of Middlesex, if Stephen, archbishop of Canterbury and several others. But what shall be said, if the assise be held in the lifetime of the principal disseysor, who, before judgment is given, dies. It seems that judgment ought not to be stayed on this account. Likewise it may be said against the assise, that an assise does not lie, if the complainant f. 226.

assisa non jacet, si querens petat communiam propter errorem, ubi sibi perquirere deberet per assisam novæ disseysinæ, petendo tenementum, scilicet ubi quis non permittit eum pascere in proprio fundo suo, & sic quietè & pacificè possidere. Item competit exceptio contra petentem, quòd communiam petere non potest quia alias petiit tenementum cum pertinentiis, & tenementum amisit cum pertinentiis: & communia tunc fuit de pertinentiis, & ideo amisit utrumque. Item poterit idē dici si tenementum petatur, quòd ille qui nunc petit tenementum in dominico aliàs inde petiit communiam, & illam amisit per judicium; & ex quo petiit communiam, & nemini servit fundus proprius, per hoc concessit tacitè quòd nullum jus habuit in tenemento in dominico, & talis exceptio oritur ex præsumptione. Et hoc quidem dici poterit, sive tenementum & solum sit querentis proprium vel cum aliis commune, ita quòd nullus sciat suum separale. Item dicere potest cōtra assisam & contra breve, q̄ die quo breve fuit impetratum fuit querens in pacifica possessione, & postea: & ita quòd quando impetravit, nulla subfuit causa impetrandi, & sic impetratio nulla. Item dicere poterit, si disseysitus fuerit quando impetravit, jam non habet querelam nec causam querendi, quia post impetrationem (& sine judicio & judice) seysinam suam sibi usurpaverit: & quia sic injustè & sine judicio, dicere potest quòd ipse jam impetravit breve super eum de nova disseysina de libero tenemento. Item dicere potest contra assisam, quòd querens amisit querelam per usurpationem sine judicio per judicium subsequens de libero tenemento, quia sibi

claims a right of common by mistake, when he ought to recover by an assise of novel disseysine, by claiming the tenement, to wit, where a person does not allow him to pasture [his cattle] in his own proper ground, and so quietly and peaceably to possess. Likewise an exception is admissible against a claimant, that he cannot claim a right of common, because he has on another occasion claimed the tenement with its appurtenances, and he has lost the tenement with its appurtenances, and the right of common was then amongst the appurtenances, and accordingly he has lost both. Likewise the same may be said if a tenement is claimed, that he, who now claims a tenement in demesne, on another occasion claimed a right of common therein, and lost that by a judgment, and since he has claimed a right of common, and nobody is entitled to a service in his own land, he has tacitly admitted that he had no right in the tenement in demesne, and such an exception rests upon a presumption. And this indeed may be said, whether the tenement and the soil is the property of the tenant or is common with others, so that no one knows his own several part. Likewise he may say against the assise and against the writ, that on the day on which the writ was sued out the claimant was in peaceable possession, and afterwards: and so that when he sued out the writ, there was no substantive cause of suing out, and so the suing out is null. Likewise he may say, if he was disseysed when he sued out the writ, he has now no claim nor cause of claim, because after the suing out of the writ (and without a judgment and a judge) he has usurped seysine to himself, and because he has so done unjustly and without a judgment, he may say that he has himself sued out a writ against him of novel disseysine from a free tenement. Likewise he may say against the assise, that the claimant has lost his claim by usurpation without a judgment through a subsequent judgment concerning the freehold, because he usurped what he ought to

usurpavit, quod exposcere debuit per judicium. Et sciendum, quòd si primò quis impetraverit, & post impetrationem si seysinam gratis oblatam receperit: secus erit si usurpaverit, ut supra: in hoc casu posset querens teneri disseysito ex reconventione, ut id quod voluit habere pro se habeat contra se, ut si usurpator agat per assisam ad retinendum id quod usurpavit, spoliatus recuperet per reconventionem spoliati, quia sine judicio, licet justè sibi seysinam usurpaverit; nihilominùs si petat per assisam id quod tenet, capi-
f. 226 b. enda erit assisa, & sic ille, qui sic usurpavit, in misericordia pro usurpatione: sed tamen restitutionem non faciet per judicium: ut de termino S. Michaelis anno regis H. decimo tertio, incipiente decimo quarto, assisa novæ disseysinæ de communia pasturæ de abbate de Ramseghe: & hoc nisi ille qui sine judicio disseysitus est, licet justè, sibi velit perquirere per aliud breve de nova disseysina versus usurpantem, vel agere de reconventione. Item si quis assisam portaverit de nova disseysina dum fuit firmarius, & non competit ei assisa, cùm teneat nomine alieno, si postmodum incipiat possidere in feodo, & fiat dominus, ubi priùs fuit firmarius, quæritur an breve impetratum ei prodesse debeat. Videtur quòd non, quia tempore impetrationis non habuit jus impetrandi, sed alius, & ideò tempus datæ spectandum erit. Ad hoc facit de ultimo itinere M. de Pateshull in comitatu Suffolk, assisa novæ disseysinæ de communia pasturæ, si Johannes de Stantone.

12. Quod sub nomine herbagii

Item notandum, quòd sub nomine herbagii non continetur glans, & ideo tempore glandis & pessonæ

have claimed by a judgment. And it is to be known that, if a person has at first sued out a writ, and after having sued it out, if he has accepted seysine gratuitously offered, (it will be otherwise, if he has usurped it, as above,) in this case the complainant might be liable to the disseysed party upon a reconvention, so that he may have against himself what he wished to have for himself, as if the usurper should proceed by an assise to retain that which he has usurped, the party despoiled should recover by a reconvention of the thing of which he has been despoiled, because he has usurped seysine to himself without a judgment, although on just grounds, nevertheless if he claims by an assise what he holds, the assise will have to be taken, and so he who has thus f. 226 b. usurped the thing, will be at mercy for his usurpation, but nevertheless he shall not make restitution by a judgment, as in St. Michael's term, in the thirteenth and fourteenth years of king Henry, an assise of novel disseysine concerning common of pasture in the case of the abbot of Ramsey: and this, unless he who has been disseysed without a judgment, although justly, should wish to claim by another writ of novel disseysine against the usurper, or to proceed for a reconvention. Likewise if a person has brought an assise of novel disseysine, when he was a farmer and he was not entitled to an assise, since he holds under another's name, if he should afterwards begin to possess in fee, and should become the lord, where formerly he was the farmer, it is asked whether a writ sued out by him ought to profit him. It seems not: because at the time of suing it out, he had not the right to sue out the writ, but another had it, and therefore the time of the date will have to be looked to. This is supported by a case in the last iter of Martin de Pateshull in Suffolk, an assise of novel disseysine concerning common of pasture, if John of Stanton.

12. That under the name of herbage,

Likewise it is to be observed that under the name of herbage acorns are not included, and therefore at the

non continetur glans.

excluduntur porci & capræ, nisi ad hoc specialiter agatur, quòd talem habeant communiam.

13. Quæ continentur sub nomine glandis. Britton, l. ii. ch. xxvi. § 3.

Glandis enim nomine continentur glans, castana, fagina, ficus & nuces, & alia quæque quæ edi vel pasci poterunt præter herbam. Item respondere poterit, quòd nullam habuit seysinam pacificam, quia nunquam ibi ingressum habuit, quin esset devadiatus & quin faceret emendas pro transgressione. Cùm jura traditionē non patiantur, sed cum ipsa re cui insunt scilicet cum corpore transferantur, ille ad quem transferuntur, statim cùm corpus habuerit cui insunt jura illa, quasi possidet, licet non statim utatur, semper videtur uti donec amittat per non usum, licet statim uti non possit, quia non evenit tempus quo uti possit: sicut videri poterit in advocationibus & jure advocationis, quia antequam vacaverit, uti non poterit cum effectu, antequam vacet, ut præsentare posset. Item si libertatem habuerit judicandi latronem, & habendi furcas, non poterit uti tali libertate, antequam casus evenerit. Item nec in assisis & mensuris juratis antequam transgressio inde facta fuerit, & idem in jure pascendi sicut in communia pasturæ, antequam pecus habeat quod possit immittere, sed tamen est semper in possessione, & videtur uti, donec amiserit per non usum. Et poterit sic quis uti tam nomine proprio quàm nomine alieno, ut si custos utatur nomine hæredis qui fuerit in custodia sua, vel si quis alius sicut rector ratione dignitatis vel ecclesiæ suæ, & semper talis utitur & possidet, cujus nomine utitur & possidetur. Et cùm ecclesia fungatur vice minoris, acquiritur per rectorem & retinet per

season of acorns and mast pigs and goats are excluded, unless it is arranged specially that they have such a common of pasture. acorns are not included.

For under the name of acorns are comprised acorns, chestnuts, beech-nuts, figs, and hazel-nuts, and whatever other things may be eaten or fed upon besides grass. Likewise he may answer that he had no peaceable seysine, because he never had entrance there, without being released upon security, and without making amends for the trespass. Since rights do not admit of delivery, but are transferred with the thing in which they are inherent, to wit, with the substance, he to whom they are transferred, immediately when he has the substance in which they are inherent, as it were possesses them, although he does not forthwith use them, he seems however to use them always until he loses them by non-user, although he cannot use them forthwith, because a time has not happened, when he could use them: just as it may be seen in the case of advowsons and in the right of advowson, because before there has been a vacancy, he cannot use it with effect, before it is vacant, so that he may present. Likewise if he has the franchise of judging a robber, and having a gallows, he cannot use that franchise before a case has happened. Likewise neither in assises nor in sworn measures, before there has been a transgression of them, and the same in the right of feeding and in common of pasture, before he has sheep which he can send in, but nevertheless he is always in possession, and seems to use it, until he has lost it by non-user. And a person may thus use it as well in his own name as in another person's name, as if a guardian shall use it in the name of the heir who is under his guardianship, or if any one else as a rector by reason of his dignity or his church, and such a person always uses it and possesses it, in whose name it is used and is possessed. And since a church fills the place of a minor, it is acquired by the rector and is retained by the rector

13. What are contained under the name of acorns.

Britton, l. ii. ch. xxiii. § 11.

eundem, sicut minor per tutorem. Et quamvis moriatur rector, non tamen cadit ecclesia à seysina sua de aliquo, de quo rector seysitus moritur nomine ecclesiæ suæ, non magis quàm minor, si custos suus moriatur, & prevenerit in alterius custodiam, & per hoc non mutatur status minoris. Et eodem modo fieri debet de rectore ecclesiæ (ut videtur) quòd eandem seysinam habere debeat successor, quam habuit suus prædecessor: quia ecclesia semper remanet in sua possessione, quamvis rector moriatur, & cùm successor fuerit institutus, statim nomine ecclesiæ est quasi in possessione, & videtur uti nomine ecclesiæ, & licet pecus non immiserit, & cùm immittere voluerit impeditus fuerit, seysinam suam & statum prædecessoris sui per assisam novæ disseysinæ recuperabit. Si autem tempore vacationis ante institutionem medio tempore à possessione ceciderit, tunc fiat breve de recuperanda seysina nomine ecclesiæ suæ, quam prædecessor suus habuit die quo obiit. Sed quid si ante mortem rectoris qui obiit fuerit ecclesia disseysita? tunc erit rectori succurrendum per breve de ingressu, ad similitudinem aliarum disseysinarum, licet rector hæres dici non possit, sed successor. In illis autem, qui jure hæreditario succedunt, non sunt hæc observanda, quia est hæreditas jacens, donec fuerit ab hærede adita. Sed tamen cùm hæreditatem adierit, fiat de eo ut supra: quia jus pascendi inest hæreditati ut supra.

f. 227.

14. Qualiter dissolvitur mutuus consensus per con-

Notandum inter cætera, quòd eodem modo, quo constituitur servitus in alieno de mutua voluntate contrahentium per communem consensum, eodem modo ex contraria voluntate mutua dissolvi poterit ex toto per

as a minor by his tutor. And although the rector dies, the church however does not fall from its seysine of anything, of which the rector died seysed in the name of his church, no more than a minor, if his guardian should die and he should pass under the guardianship of another person, and thereby the *status* of the minor is not changed. In the same way it ought to be done concerning the rector of a church (as it seems), that his successor ought to have the same seysine as his predecessor had, because the church always remains in his possession, although the rector dies, and when his successor has been instituted, forthwith in the name of his church he is as it were in possession, and seems to use in the name of his church, and although he has not sent in any sheep, and when he wished to send in some sheep, he has been hindered, he shall recover his seysine and the *status* of his predecessor by an assise of novel disseysine. But if in the time of the vacancy before his institution in the meantime he has fallen from the possession, then let a writ issue for recovering seysine in the name of his church, which his predecessor had on the day on which he died. But what if before the death of the rector, who has died, the church has been disseysed? then the rector is to have the aid of a writ of entry after the likeness of other disseysines, although the rector cannot be called the heir, but the successor. But in the case of those who succeed by hereditary right, these things are not to be observed, because the inheritance is vacant, until it is taken up by the heir. But when he has taken up the inheritance, let it be done with him as above, because the right of pasturage is inherent in the inheritance as above. f. 227.

14. How a mutual agreement is dissolved by a contrary will

It is to be observed amongst other things, that in the same manner in which a servitude is established in an other's ground by the mutual will of the contracting parties by a common consent, in the same way by a contrary mutual will it can be dissolved altogether by a

trariam voluntatem et dissensum. Britton, l. ii. ch. xxiv. § 6.

communem dissensum. Communem dissensum dico, quia non sufficit, si tantum una pars dissentiat, si non dissentiant ambæ. Item dissolvi poterit ex toto per communem dissensum, & converti ad alium usum per alium consensum, sive hoc sit inter participes & hæredes, vel inter vicinos dominos tenementi, vel extraneos, qui non nisi communiam clamare possunt in tenemento: ut si ita convenerit, quòd tenementum, quòd prius fuit communia inter partes, dividatur pro certis portionibus, & ita quòd id quod fuit commune, jam sit omnium pro virilibus portionibus separale, secundùm majus & minus, & in quo casu cùm semel consenserint, iterum non poterunt dissentire.

15. Quod constitutio servitutis potest restringi et mutari. Britton, l. ii. ch. xxiv. § 7.

Item potest constitutio servitutis aliquando minui & restringi, ut si priùs constituatur quòd per totum & ubique, restringi poterit quoad certum locum. Item mutari, ut si id, quod in uno loco certo, mutetur ad alium locum certum. Item quod priùs sine numero, coarctari poterit ad certum numerum. Item quod ad omnimoda averia, coarctari potest ad certum genus. Item quod omni tempore, coarctari poterit quòd certo tempore, dum tamen hoc fiat de voluntate contrahentium. Et eodem modo poterunt omnia prædicta augeri & ampliari, sed non contra voluntatem contrahentium, quia per hoc competeret assisa novæ disseysinæ domino tenementi, sed in contrarium per vim ageretur, sicut competeret assisa novæ disseysinæ de communia pasturæ ei, cui debetur servitus, secundùm modum & constitutionem servitutis. Est tamen quædam consti-

common dissent. I say a common dissent, because it is not sufficient if one party only dissents, if they do not both dissent. Likewise it may be altogether dissolved by a common dissent, and converted to another use by another consent, whether this be between parceners and heirs, or between neighbouring lords of the tenement, or between strangers, who can only claim a right of common in the tenement: as if it shall have been thus agreed upon, that the tenement, which was formerly in common, should be divided beween the parties in certain portions, and so that what was formerly common amongst all, is now several according to each man's share, more or less, as the case may be, and in which case, if they have once consented, they cannot again dissent. and disagreement.

Likewise the constitution of a servitude may be sometimes diminished and restricted, as if it be previously constituted with respect to the whole and everywhere, it may be restricted with respect to a certain place. Likewise it may be changed, as if that which is constituted in one certain place, should be changed to another certain place. Likewise that which was formerly without number, may be narrowed within a certain number. Likewise that which was for cattle of every kind, may be confined to a certain kind. Likewise that which was at all times, may be confined to a certain time, provided however this be done with the will of the contracting parties. And in the same way all the aforesaid matters may be increased and amplified, but not against the will of the contracting parties, because on that account an assise of novel disseysine would be admissible for the lord of the tenement, but on the contrary proceedings would be had by violence, just as an assise of novel disseysine concerning common of pasture would be admissible for him, to whom the servitude is due, according to the mode and constitution of the servitude. There is however a certain constitution, which is 15. That the constitution of a servitude may be restricted and changed.

tutio, quæ dicitur constitutio de Merton, per quam etiam invito eo, cui servitus debetur, communia coarctatur, unde primò videndum est qualis est illa constitutio, & est talis.

16. De constitutione de Merton per W. de Ralegh tunc justiciarium.

Quia multi sunt magnates, qui feoffaverunt milites & liberè tenentes suos in maneriis suis de parvis tenementis, & qui impediti sunt per eosdem, quòd commodum suum facere non possunt de residuo maneriorum suorum, sicut de vastis, boscis, & pasturis magnis, desicut ipsi feoffati sufficientem habere possent pasturam, scilicet quantum ad tenementa sua pertinet, ideò provisum est & concessum ab omnibus, quòd cùm f. 227 b. hujusmodi feoffati à quibuscunque de cætero arramaverint erga dominos suos assisam novæ disseysinæ de communia pasturæ, de hoc quòd aliquam partem tenementorum suorum excoluerint, si coram justiciariis Britton, l. ii. ch. xxiii. § 6. cognoverint quòd sufficientem habeant pasturam, quantum ad tenementum suum pertinet, cum libero ingressu & egressu, & chaceam de tenementis suis usque ad pasturam illam vel viam, tunc inde sint contenti, et illi de quibus tales questi sunt quieti sint de hoc, quòd commodum suum ita fecerint de terris, vastis, et pasturis suis. Si autem dixerint quòd sufficientem pasturam non habuerint, quantum pertinet ad tenementa sua, cum sufficienti ingressu et egressu, tunc inde inquiratur veritas per assisam. Et si per assisam recognitum fuerit, quòd in aliquo impediverint ipsius domini ingressum vel egressum, vel quòd habeant[1] sufficientem pasturam (secundùm quod prædictum est), tunc recuperant querentes seysinam suam per visum recognitorum, ita quòd per discretionem & sacramentum eorundem habeant conquerentes sufficientem pasturam cum sufficienti et competenti ingressu et egressu, in forma prædicta, et disseysitores in misericordia, et

[1] "non habeant," MS. Rawl. C. 160. This is the reading adopted in the Statutes of Merton as printed by the Record Commissioners.

called the Constitution of Merton, through which a right of common is restricted against the will of him to whom the servitude is due, whence we must first see what is the character of that constitution, and it is of this character:

16. Of the Constitution of Merton by William de Ralegh, then justiciary.

Because there are many magnates, who have enfeoffed knights and their own freehold tenants in their manors with small tenements, and who are hindered by them that they cannot employ for their own advantage the rest of their manors, such as their waste lands, woods, and great pastures, whilst their feoffees can have sufficient pasture, to wit, as much as appertains to their tenements, it has accordingly been provided and granted by all, that when feoffees of this kind have instituted against f. 227 b. their lords an assise of novel disseysine concerning common of pasture, on the ground that they have cultivated some part of their tenements, if they have acknowledged before our justiciaries that they have a sufficient pasturage as much as appertains to their tenement with free ingress and egress, and a drift-way from their tenements up to that pasturage or a road, then let them be content therewith, and let those, concerning whom they have complained, be undisturbed on the ground that they have turned to their own advantage their lands, wastes, and pastures. But if they shall say that they have not sufficient pasturage according to what belongs to their tenements, with sufficient ingress and egress, then let the truth be inquired of by the assise. And if it be found by the assise, that they have hindered in any respect the ingress and egress of the lord, or that they have sufficient pasturage (according to what has been said above), then let the complainants recover their seysine by the view of recognisors, so that through their discretion and oath the complaints shall have sufficient pasturage with sufficient and suitable ingress and egress in the above form, and the disseysors shall be amerced and shall restore the damages as they used to be pre-

damna reddant, sicut priùs reddi solent ante provisionem istam. Si autem recognitum fuerit per assisam, quòd querentes sufficientem habeant pasturam cum libero ingressu et egressu, secundùm q̃ prædictum est, tunc licitè faciant domini sui commodum de residuo, et in quo casu, si quis liber homo feoffatus fuerit per aliquem, et occasione alicujus assisæ captæ vel alia occasione, vel si non permiserit dominum suum includere, vel si, cùm incluserit, hayas suas fregerit et fossata, et muros suos prostraverit per vim, cui resisti non possit, competit domino breve domini regis in hac forma.

17. Breve de Constitutione de Merton, secundum quod tunc provisum fuerit per W. de Ralegh justiciarium.

Rex vicecom̃ salutem. Ostensum est nobis ex parte A. quòd cùm in curia nostra coram nobis et consilio nostro sit provisum et concessum, quòd magnates Angliæ, et milites, et alii qui liberos tenentes suos feoffaverint de parvis tenementis in maneriis suis, commodum suum facere possint de residuo maneriorum suorum sicut de vastis, boscis et pasturis, si ipsi feoffati sufficientem habeant pasturam, quatenus ad tenementa sua pertinet, cum libero ingressu et egressu, et ipse A. parcum suum per multum tempus jam inclusum habuit, boscum vel hujusmodi: B. qui parvum tenementum habet in eadem villa, vel alia, et de feodo ipsius A. occasione cujusdam assisæ novæ disseysinæ inter eosdem A. et B. nuper captæ de communia pasturæ ipsius B. quam pertinere dixit ad liberum tenementum suum in eadem villa, non permittit ipsum A. parcum suum habere inclusum, immò hayas suas frangit et fossata, desicut communiam pasturæ habere poterit sufficientem extra parcum vel boscum illum, quatenus[1] ad tenementum suum pertinet, cum libero ingressu et egressu: et ideò tibi præcipimus, quòd assumptis tecum liberis et legalibus hominibus de proximo vicineto per quos rei veritas &c., in propria persona tua accedas apud talem villam et per

[1] "quatenus" down to "egressu," omitted MS. Rawl. C. 160.

viously restored before that provision. But if it has been recognised by the assise, that the complainants have a sufficient pasturage with a free ingress and egress, according to what has been said above, then let the lords pursue their own advantage with the remainder, and in which case, if any free man has been enfeoffed by any one, and on occasion of any assise having been held, or on any other occasion, or if he has not permitted his lord to enclose, or when he has enclosed he has broken down his hedges or his fosses, and thrown down his walls by violence, which he could not resist, the lord is entitled to a writ from the lord the king in this form.

17. A writ concerning the Constitution of Merton, according to what was then provided by William de Ralegh, justiciary.

The king to the viscount greeting. It has been shown to us on the part of A. that since it has been provided and granted in our court before us and our council, that the magnates of England, the knights, and others who have enfeoffed their freehold tenants with small tenements in their manors, may make profit for themselves out of the remainder of their manors as out of their waste lands, their woods and pastures, if the feoffees themselves have a sufficient pasturage as far as appertains to their tenements with free ingress and egress, and A. himself has had his park enclosed for a long time, or his wood or such like, and B., who has a small tenement in the same vill or another, held in fee of A., on occasion of a certain assise of novel disseysine between the said A. and B. lately held concerning B.'s common of pasture, which he said belonged to his free tenement in the same vill, does not permit A. to have his park enclosed, nay he breaks down his hedges and fosses, whilst he can have sufficient common of pasture outside the park or that wood, as much as pertains to his tenement with free ingress and egress: and accordingly we enjoin you, that having taken with you free and loyal men of the nearest neighbourhood, by whom the truth of the matter, &c., you go in your own person to such a vill

eorum sacramentum &c., si prædictus B. sufficientem possit habere pasturam extra prædictum parcum vel
f. 228. boscum, quatenus pertinet ad liberum tenementum suum in eadem villa, cum libero ingressu et egressu vel non. Et si ita esse inveneris, tunc eidem A. pacem inde habere facias ne amplius &c. Teste &c. Ad quod inprimis videndum est, qualiter constitutio illa sit intelligenda, ne malè intellecta trahat utentes ad abusum, videri oportet utrum ille (quem restringit constitutio) sit liber homo proprius vel alienus. Si autem sit alienus, non ei imponit legem constitutio, tum quia habet servitutem illam fortè sicut ex consensu & conventione ubique, quæ dissolvi non potest nec per contrariam voluntatem & dissensum, tum quia non feoffatus est per dominum soli, quod coarctari potest ad certum numerum & determinatum secundùm quantitatem sui tenementi. Et unde in hoc casu, si dominus soli & proprietatis sibi velit aliquid appropriare, & includere, hoc facere non poterit, sine voluntate & licentia prædictorum; & si fecerit, per assisam recuperabunt. Si autem fuerint liberè tenentes proprii, tunc refert qualiter fuerint feoffati, quia non omnes nec in omnibus per constitutionem restringuntur, & ideò videndum erit utrum feoffati fuerint largè scilicet per totum, & ubique, & in omnibus locis, & ad omnimoda averia & sine numero, & ita tamen quòd hujusmodi communia ad ipsos pertineat ratione feoffamenti, & non propter usum, tales non ligat constitutio memorata, quia feoffamentum non tollit, licet tollat abusum, & maximè propter consensum eorum voluntarium, qui servitutem & communiam concesserunt. Si autem communia fuerit stricta cum numero averiorum certo & determinato, licet usus se largiùs et latiùs

and by their oath &c. if the aforesaid B. has sufficient pasturage outside the said park or wood as much as appertains to his free tenement in the same vill, with free ingress and egress or not. And if you find it to be the case, then let A. have peaceable enjoyment that he may be no more, &c. Witness, &c. Upon which the first thing to be seen to is, how that constitution is to be understood, lest if ill-understood it should lead those using it to abuse it; we must see whether he, whom the constitution restrains, is his own free man or another's. But if he be another's, the constitution does not impose upon him a law, as well because he has perhaps the servitude as it were from consent and agreement everywhere, which cannot be dissolved, not even by a contrary will and dissent, as because he has not been enfeoffed by the lord of the soil, so that he may be confined to a certain and determinate number according to the quantity of his tenement. And hence in this case, if the lord of the soil and of the property wishes to appropriate to himself and to enclose any part, he cannot do it without the will and license of the aforesaid, and if he shall do so, they shall recover by an assise. But if they are their own free tenants, then it is of importance how they have been enfeoffed, for they are not restricted by the constitution, neither all of them nor in all matters, and accordingly it must be seen whether they have been enfeoffed largely, to wit, for the whole and everywhere and in every place, and for all kinds of cattle and without number, and so nevertheless that this kind of common right pertains to them by reason of their feoffment, and not on account of the use, the aforesaid constitution does not bind such, because it does not take away the feoffment, although it takes away the abuse, and chiefly on account of the voluntary consent of those, who have granted the servitude and the right of common. But if their right of common be strict with a certain and determinate number of cattle, although the use has been larger and more ex- f. 228.

habuerit quàm necesse esset, tales ligat constitutio, quòd coarctentur ad certum locum et infrà certum locum, dum tamen locus ille sufficiens sit et competens cum libero ingressu et egressu et competenti, quòd non sit gravis nec difficilis. Competens autem debet esse locus, ita quòd non longiùs distet, sed propinquiùs assignetur. Item eodem modo si ita feoffatus fuerit quis, sine expressione numeri vel generis, sed ita, cum pastura quantum pertinet ad tantum tenementum in eadem villa, talem ligat constitutio sicut priùs cum expressione: quia cùm constet de quantitate tenementi, de facili perpendi poterit de numero averiorum, & etiam de genere, secundùm consuetudinem locorum. Item si qualitercunque usus fuerit vel feoffatus largè vel strictè, si loco competenti usus fuerit, & sive coarctari possit sive non, non tamen coarctari debet cum damno & gravamine ad locum longiùs distantem, cum distantia inducant incommoditatem. Et eodem modo coarctari non debet, nisi velit, si accessus sit difficilior. Item tempus spectandum erit, cùm omnis nova constitutio futuris formam imponere debeat & non præteritis. Item tempus spectandum erit, scilicet quòd tenementum tempore feoffamenti jacuit incultum, & q tenementum redactum fuit in culturam. Item quòd tenementum sit pratum, & quòd inclusum & positum in defensum, cùm nemo possit communiam petere in aliquo tenemento quod excoli possit vel includi, vel poni in defensum omni tempore vel saltem aliquo, & ex aliqua generali constitutione, ut si quis dicat: do tibi tale tenementum cum com-
f. 228 b. munia pasturæ, quæ pertinet ad tantum tenementum in tali villa cum certo numero averiorum, vel sine

tensive than was necessary, the constitution is binding on such persons, that they be restricted to a certain place and within a certain place, provided however that place be sufficient and suitable with a free and suitable ingress and egress, so that it is not heavy nor difficult. But the place ought to be suitable, so that it should be not farther distant, but be assigned nearer. Likewise in the same way, if a person has been so enfeoffed, without the expression of any number or kind, but with just so much pasturage as appertains to a tenement of that size in the same vill, the constitution binds such a person as before with the expression, because when it is settled concerning the size of the tenement, it can be easily calculated concerning the number of the cattle, and even concerning the kind, according to the custom of places. Likewise if he has used it in any manner, whether largely or strictly enfeoffed, if he has used a suitable place, and whether he can be restricted or not, he ought not however to be restricted with damage and grievance to a place far distant, since distance brings with it inconvenience. And in the same manner he ought not to be restricted, unless he is willing, if access to it is more difficult. Likewise time is to be taken into account, since every new constitution ought to impose a form upon future matters, and not upon things past. Likewise time must be considered, to wit, that the tenement at the time of the enfeoffment lay uncultivated, and that the tenement was brought into cultivation. Likewise that the tenement was a meadow, and that it has been enclosed and placed within fences, since nobody can claim a right of common in any tenement, which can be cultivated or enclosed, or placed in a state of defence at all times or at least at some times, and from some general constitution, as if a person should say: I give you such a tenement with a common of pasture, which belongs to f. 228 b.
such a tenement in such a vill with a certain number of cattle or without a number, this will have to be under-

numero, hoc intelligendum erit de communia pasturæ quæ communis esse debet & pertinere ad liberum tenementum, hoc est non tenemento quod possit excoli, vel licito sed non omni, vel aliter dum includitur vel ponitur in defensum tempore, vel si singulis annis possit includi & poni in defensum & excoli, vel alio quod possit includi, nisi hoc faciat specialitas & modus constitutionis servitutis, vel longus usus continuus & pacificus. Modus constitutionis servitutis, ut si dicat quis, do tibi tantam terram cum communia pasturæ ad tot averia &c. per totam terram meam ubique in terris colendis, pratis & clausis, & in omnibus locis, & hoc non erit sic intelligendum quod omni tempore, nisi tantum temporibus competentibus, scilicet post blada asportata, & fœna levata, vel quando tenementum jacet incultum & ad waractum, vel si dicat expressè sic, ubique scilicet quando tenementum jacet incultum &c., non propter hoc impediri debet dominus quin terram suam excolat quolibet anno si velit, quia non imponit sibi ipsi servitutem per hoc quin possit. Si autem ita dicat, cum pastura per totum & in omnibus locis, & secundo anno vel tertio, in terra colenda, quando jacet ad waractum, & adhuc idem erit ubi jacuerit ita ut dicitur, quia benè poterit esse quòd nunquam jacebit, nec imponitur ei necessitas, quòd non colat: quia per hoc non includit se quin possit. Si autem sic dicat, omni tempore & in omnibus locis, scilicet quòd secundo anno jaceat campus ad waractum vel incultus & apertus, & quòd tali tempore communiam habeat, tali tempore excoli non possit nec includi, & maximè ubi hoc facit longus usus vel consuetudo à vicinis approbata & dominis, quæ pro lege

stood concerning a common right of pasturage, which ought to be common and to belong to a free tenement, that is, not concerning a tenement which could be cultivated or is permissible to be cultivated, but not altogether so, or otherwise, whilst it is enclosed or placed under defence at a certain time, or if in each year it can be enclosed and placed under defence and cultivated, or in some other way it may be enclosed, unless the speciality and mode of the constitution of the servitude effects it, or a long continuous or peaceable use of it. The mode of constituting a servitude [is], as if some one should say, I give you so much land with common of pasture for so many beasts, &c. throughout the whole of my land everywhere, in arable land, in meadows and inclosures, and in all places, and this shall not be understood as at all times, but only at suitable times, to wit, after the corn has been carried away, and the hay raised, or when the tenement lies uncultivated and fallow, or if he should say expressly thus, everywhere, to wit, when the tenement remains uncultivated, &c., the lord ought not on that account to be hindered from cultivating his own land every year, if he wishes, because he does not himself impose upon himself a servitude, which would prevent him from doing so. But if he shall say thus, with pasturage throughout the whole and in all places, and in every second year, or in every third year, in the tillage land when it lies fallow, and it will be the same when it shall lie fallow so as it is said, because it may well be that it will never lie fallow, nor is any necessity imposed upon him, that he should not cultivate, because he does not thereby include himself from cultivating it. But if he so says, at all times and in all places, to wit, that in the second year the land shall lie fallow or uncultivated or open, and that at such time he shall have a right of common, during such time it cannot be cultivated nor inclosed, and chiefly where this is sanctioned by long use and custom approved by

observari debet inter tales. Item vel ubi hoc faciat vicinitas, & sine constitutione. Poterit autem esse servitus personalis & realis. Item personalis & realis certis horis & certis temporibus. Item personalis tantum, & sic debetur personis & non tenementis, & quæ propriè dici posset herbagium. Item localis & non certis personis, sicut alicujus universitatis, burgensium & civium, & omnes conqueri possunt et unus sub nomine universitatis. Et in fine hujus constitutionis notandum, quod in extraneis personis præfertur usus constitutioni, si largè usi sunt, quia ab usu coarctari non debent. In propriis verò tenementis præfertur constitutio usui. Item dici poterit amensuratio, tam de tenemento quàm de pecoribus, ut si quis uti et pascere infrà rationabilia defensa illius domini, cujus fuerit tenementum, vel assisa novæ disseysinæ de libero tenemento,' quia aliter vel alibi.

Britton, l. ii. ch. xxvii. § 9.

Cap. XXIX.

f. 229. 1. De amensuratione. Britton, ii. ch. xxvii. § 1. Fleta, 262.

Cum quis jus habeat pascendi in alieno fundo, aliquando plura immittit averia quàm liceat, aliquando plura quàm expediat. Si autem plura quā liceat, ut, si ei concedatur communia ad certum numerum averiorum, vel ad certum genus, vel quantum pertinet ad tantum tenementum in eadem villa, si plura immittat in numero vel in genere quàm ei liceat contra voluntatem ejus cujus fundus fuerit, si talis incontinenti resistere non possit, competunt ei duo remedia, secundùm quòd elegerit, scilicet nova disseysina pro ea parte pro qua ille qui communiam habet debitum numerum excedat vel genus: quia in hoc contractat

the neighbours and by the lords, which ought to be observed as law amongst such persons. Likewise where the neighbourhood supports this, and without any constitution. But a servitude may be personal and real. Likewise personal and real at certain hours and at certain times. Likewise personal only, and so it is due to persons and not to tenements, and which may properly be called herbage. Likewise local and not to certain persons, as of a corporation of burgesses or citizens, and all may complain or one [only] under the name of the corporation. And at the end of this constitution it is to be noted, that as regards outside persons the usage is preferred to the constitution, if they have largely used it, in for they ought not to be restricted from the use. But in one's own tenements the constitution is preferred to the usage. Likewise it may be termed an admeasurement, as well of the tenement as of the sheep, as if a person claims to use and to feed within the reasonable fences of the lord, whose tenement it is, or an assise of novel disseysine concerning the freehold, because otherwise, or elsewhere.

Chapter XXIX.

f. 229.

1. Of admeasurement.

When a person has a right of pasture in another's ground, he sometimes sends in more cattle than he is entitled to do, and sometimes more than is expedient. But if he sends in more cattle than he is entitled to, as if there be granted to him a right of common for a certain number of cattle, or for a certain kind, or as much as appertains to a tenement of such a size in the same vill, if he sends in more in number or in kind than is allowable for him against the will of the person whose ground it is, if such a person cannot forthwith resist, he is entitled to two remedies, according as he shall choose, to wit, novel disseysine for that part in respect of which he, who has a right of common, exceeds the due number or kind, because in so doing he deals with the tenement

tenementum domini sui contra voluntatem suam, ac sicut esse posset, si omninò nullam communiam haberet, & averia sua contra voluntatem domini sui per violentiam immittere vellet. Competit etiam ei aliud remedium, scilicet quòd per aliud breve id quod debitum numerum vel genus excedit redigatur ad licitum numerum, & debitum, & mensuram. Amensuratio enim nihil aliud est ex virtute vocabuli, nisi ad mensuram, & subintelligitur redactio. Aliis autem, qui communiam tantum habent in illo fundo, aliud remedium non competit nisi amensuratio. Item si quis plura habeat quàm expediat, locum habet amensuratio, ut si cui concedatur talis communia ad omnimoda averia sua sine numero & aliis similiter successivè vel ad certum numerum vel sine numero, si quis tot immittat quòd pastura omnibus non sufficiat, competit remedium quòd id quod excedit & nocet redigatur ad mensuram, per tale breve vic. directum.

2. Breve, quare quis superoneravit, vicecomiti exequendum. Britton, *ib.*

Rex vicecomiti salutem. Questus est nobis talis, quòd talis injustè superoneraverit cōmunem pasturam suam in tali villa, ita q̄ in illa plura habet animalia & pecora, quàm habere debet & ad eum pertinet habendum. Et ideò tibi præcipimus, quòd justè & sine dilatione amensurari facias pasturam illam, ita quòd prædictus talis non habeat in ea plura animalia & pecora quàm habere debet & ad eum pertinet habendum secundùm liberum tenementum suum quod habet in eadem villa, & quòd prædictus talis habeat in pastura illa tot animalia & pecora quot habere debeat,[1] & ad eum pertinet habendum: ne amplius, &c. de hoc quòd dicit plura, scire debet quot habere debet, si ad certum numerum vel secundùm quantitatem terræ suæ, per hoc quod dicit secundùm liberum tenementum

[1] "debet," MS. Rawl. C. 160.

of his lord against his will, and just as it might be, if he had no right of common at all, and chose to send in his cattle by violence against the will of his lord. He is entitled also to another remedy, to wit, that what exceeds the due number or kind shall be reduced to the allowable and due number and measure. For admeasurement is nothing else from the composition of the word than "to "measure" (ad mensuram), the word "reduction" (redactio) being understood. But to others who have only a right of common in that ground, no other remedy is allowed than admeasurement. Likewise if a person has more cattle than is expedient, admeasurement is applicable, as if any one has a grant of a right of common for his cattle of every kind without number, and others similarly successively, or for a certain number or without number, if a person sends in so many that there is not sufficient pasture for all, the proper remedy is that what exceeds and is hurtful should be reduced to measure by a writ of this kind directed to the viscount.

2. A writ, "wherefore a person has overburdened" to be executed by the viscount.

The king to the viscount greeting. Such a person has complained to us, that so-and-so has unjustly overburdened his common pasture ground in such a vill, so that he has more animals and sheep on it than he ought to have, and than appertains to him to have. And accordingly we enjoin you, that justly and without delay you cause to be admeasured that pasture ground, that the aforesaid so-and-so shall not have in it more animals or sheep than he ought to have and than appertains to him to have according to his free tenement, which he has in the same vill, and that so-and-so aforesaid shall have in that pasture ground so many animals and sheep, as he ought to have and as appertains to him to have; and no more &c. If he says he ought to have more, he ought to know how many he ought to have, if up to a certain number or according to the quantity of his land, that is according to the quantity of the free tenement which he

quod habet in prædicta villa, & unde si tenens dicere possit quòd plura habere debeat, licebit ei.

3. De officio vicecomitis in brevi de amensuratione.

Officium verò vicecomitis est, quòd accepto brevi, in propria persona sua accedat ad locum in quo petitur communia, & ibi conveniri faciat hundredum & omnes quos amensuratio illa tangit, & in præsentia utriusque partis (si sum̄onitioni interesse velint) & quæ rationes suas & responsiones prætendant, per sacramentum vicinorum, per quos rei veritas melius sciri poterit, & per inspectionem chartarum & instrumentorum diligenter inquirat, quot averia & animalia ille de quo queritur habere debeat per constitutionem servitutis, vel ex causa donationis, vel ratione tenemēti sui, vel ex vicinitate vel per lōgum usum. Item si sine numero & ubique, tunc inquirat ad quot averia sufficiat pastura illa, & quot sustinere possit secundùm tempus feoffamenti, & secundùm tempus constitutionis servitutis, ut si tunc sufficiens fuerit omnibus qui ibi communicare deberent. Et si postmodum effecta sit insufficiens per superonerationem, vel per novum feoffamentum, & per quod alii, qui communicare debent ratione primi feoffamenti, communiam suam amittant in parte vel in toto, ut sic omnibus examinatis, procedat amensuratio, & quod superfluum fuerit redigatur ad mensuram. Est enim modus & mensura & fines certi, ultra quæ citra quæ nequit consistere rectum. Item notandum quòd communicantibus contra dominum tenementi duo competunt remedia de superoneratione: vel amensuratio, vel assisa novæ disseysinæ de communia pasturæ. Si autem communia per superonerationem in parte amittatur vel in toto, eodem modo sicut domino competit

f. 229 b.

has in that vill, and hence if the tenant can say that he ought to have more, it shall be allowable to him.

3. Of the office of the viscount in a writ of admeasurement.

But the office of the viscount is, that having received the writ, he should in his own person go to the place in which the right of common is claimed, and there cause the hundred and all, whom that admeasurement affects, to be convened, and in the presence of both parties, if they are willing to be present at the summoning, and who may set out their reasons and replies, by the oath of their neighbours, through whom the truth of the fact may be better known, and by the inspection of deeds and instruments he should inquire diligently, how many cattle and animals he, of whom complaint is made, ought to have according to the constitution of the servitude, or by reason of a donation, or in regard of his tenement, or from vicinity, or through long usage. Likewise if without number and everywhere, then let him inquire for how many cattle that pasturage suffices, and how many it can support according to the time of the feoffment and according to the time of the constitution of the servitude, f. 229 b. as if at that time there has been sufficient for all who ought to have right of common. And if it has been subsequently rendered insufficient by overburdening or by a new feoffment, and through which those, who ought to enjoy a right of common by reason of the first feoffment, are losing their common in part or in whole, and so after everything has been examined, let the admeasurement proceed, and let what is superfluous be reduced within measure. For there is a mean and a measure, and certain limits, beyond which and within which right cannot consist. Likewise it is to be noted that commoners have two remedies against the lord of the tenement for overburdening: either an admeasurement, or an assise of novel disseysine concerning a common right of pasture. But if the enjoyment of common is lost either in part or in whole by overburdening the pasture, in the same way as in the case of the lord they are entitled to a remedy

contra eos de superoneratione contra voluntatem suam ut supra dictum est, & eodem modo plures communicantes eadem habent remedia inter se, si aliquis eorum superoneraverit. Item plures hæredes & participes si aliquam partem tenementi sui relinquerint[1] ad pasturam in communi, si unus vel quidam superoneraverint, quòd locum habeat amensuratio vel assisa novæ disseysinæ, non de communia pasturæ sed de libero tenemento, ac si unus sive alius aliquid sibi velit appropriare. Item si sit aliquis qui pasturam velit superonerare aliter quàm liceat vel expediat, vel aliter quàm pater vel mater vel alius antecessor fecerit, fiat amensuratio per tale breve.

Britton, ii. ch. xxvii. § 9.

4. Coram justiciariis breve de eodem.

Rex vicecomiti salutem. Si A. fecerit te securum, de clamore &c. tunc sum̄oneas per bonos sum̄onitores B. quòd sit coram justiciariis ad primam assisam ostensurus quare superonerat communem pasturam, & bruerum in tali villa, quæ pertinet ad liberum tenementum suum in eadem villa, vel in alia, & aliter quàm C. pater ipsius B. cujus hæres ipse est facere consuevit, & habeas ibi, &c. Et procedatur eodem modo per hoc breve quo supra & summaria fiat inquisitio hîc & ibi, scundùm quod in foro ecclesiastico fieri debet de bastardia.

Cap. XL.

1. De placito, quo jure.

Non semper debetur servitus prædiis vicinorum ex consensu & constitutione dominorum, ut si quis habeat communiam pasturæ & jus pascendi in fundo alieno sed ex negligentia & dissimulatione vicini propter usum tantum, & talis seysina magis habet substantiam ex tempore quàm ex jure, & ideo absurdum erit om-

[1] "reliquerint," MS. Rawl. C. 160.

against those who overburden it against their will, as above said, and in the same way several commoners have the same remedies amongst themselves, if any of them has overburdened it. Likewise several heirs and parceners, if they have left any part of their tenement for pasturage in common, if one or more have overburdened it, that an admeasurement or an assise of novel disseysine shall take place, not concerning the common right of pasture, but concerning the free tenement, as if one or the other wished to appropriate it to himself. Likewise if there be any one, who wishes to overburden the pasturage otherwise than is allowable or is expedient, or otherwise than his father or mother or other ancestor has done, let an admeasurement be made by such a writ.

4. A writ concerning the same before the justiciaries.

The king to the viscount greeting. If A. has given you security concerning his complaint &c., then summon by good summoners B. that he appear before the justices at the first assise to show why he has overburdened the common pasture ground and the heath in such a vill, which appertains to his free tenement in the same vill, or in another, and otherwise than C. the father of the same B., whose heir he is, was accustomed to do, and have there &c. And let the proceedings be under this writ the same as above, and let a summary inquisition be made here and there, according to what ought to be done in the ecclesiastical court in a case of bastardy.

Chapter XL.

1. Of the plea of Quo jure.

A servitude to the lands of neighbours is not always due to them from the consent and appointment of the lords, as if a person has a community of pasture and a right of feeding on another person's ground, but from the negligence and dissimulation of a neighbour on account of user only, and such a seysine has its substance more in time than in right, and accordingly it will be

nino quòd cum tali remaneat possessio, cùm semel per assisam acquisita fuerit, nisi doceat de jure suo. Sed priùs videndum est cui competat hæc actio. Et sciendum quòd non potest quis alium implacitare per hoc breve (Quo jure) nisi capitalis dominus totius manerii vel villæ, in qua petitur communia, vel ali-
f. 230. cujus partis, vel quòd sint de diversis baroniis, vel diversis feodis, vel diversis feoffamentis, & ita quòd dominus qui petit, & ille à quo petitur jura sua habeant separata, scilicet tenementa diversa & diversas pasturas, secundùm quod pastura largè se habuerit vel strictè. Si autem plures feoffati fuerint ab uno domino in uno manerio vel in una villa, non competit eis tale breve vel talis actio, cùm inter vicinos rectè loquendo de eadem baronia & eodem feodo, vicinitas potiùs dici debet quàm communia debita, ut si dicatur, si unus communicet cum vicino & vicinus cum eo, & si non, non. Cùm igitur quis per judicium seysinam suam recuperaverit per assisam propter usum, amittere debet illam, nisi doceat quo jure illam exigat per hoc breve, & poterit unus dominus capitalis vel
Britton, ii. ch. xxviii. § 2. plures placitare versus unum dominum capitalem vel plures, sive tenementa habeant in diversis villis vel in una, dum tamen ibi sint diversæ baroniæ & diversa feoda.

2. Rex vicecomiti salutem. Si talis fecerit te securum
Breve, quo jure quis exigat communiam pasturæ. &c. tunc summoneas talem quòd sit &c. ostensurus quo jure exigit communiam pasturæ in terra ipsius talis in tali villa, desicut ille talis nullam communiam habet in terra ipsius talis in alia tali villa, nec idem talis servitium ei facit quare communiam in terra sua habere debeat (ut dicit), & habeas, &c. In quo casu, cùm talis sum̄onitus fuerit, potest se essoniare ad primum diem, & eodem modo querens si voluerit. Si

altogether absurd that possession should remain with such a person, when it has once been acquired by an assise, unless he shows his right. But we must first see who is entitled to this action. And it is to be known that a person cannot implead another by this writ (Quo jure) except he is the chief lord of the whole manor or vill, in which the right of common is claimed, or of some part of it, or that they are of different baronies, or of f. 230. different fees, or of different feoffments, and so that the lord who claims, and he from whom the claim is made, have their rights separate, to wit, diverse tenements and diverse pastures, according as the pasturage is of an extensive or narrow description. But if several persons have been enfeoffed by one lord in one manor or in one vill, they are not entitled to such a writ or to such an action, since between neighbours, rightly speaking, of the same barony and the same fee, it ought to be called vicinage rather than common, as if it be said if one commons with a neighbour and a neighbour [in return] with him, and if not, not. When therefore any one by a judgment has recovered his seysine by an assise on account of user, he ought to lose it, unless he can show by what right he exacts it through this writ; and one chief lord or more may implead one chief lord or more, whether they have tenements in diverse vills or not, provided there are there diverse baronies and diverse fees.

2. A writ, by what right a person exacts a common of pasture.

The king to the viscount greeting. If such a person has given security &c., then summon so-and-so that he be present &c. to show by what right he exacts common of pasture in the land of such person in such a vill, since so-and-so has no common of pasture in the land of such person in another such vill, nor does so-and-so do any service to him wherefore he ought to have common of pasture in his land (as he says), and have there &c. In which case, when so-and-so has been summoned, he may essoin himself on the first day, and in the same manner the claimant, if he wishes. But if he has not come nor

autem non venerit nec se essoniaverit, attachietur sicut in personali actione: quia hic non petitur pastura sicut per breve de recto, ut infrà dicetur. Si autem venerit, poterit docere quo jure communiam petat, ut si simul communicaverint, scilicet unus cum alio de communi consensu ab antiquo. Cùm autem post omnes districtiones semel comparuerit, tunc statim inquiratur à justiciariis si implacitatus communiam clamat, & respondere potest quòd nullam, vel quòd pasturam clamat, & tunc inquiratur qualem, & specificata communia, extunc procedatur sicut per breve de recto, & si extunc defaltam fecerit, capiatur pastura in manum domini regis, donec comparuerit per parvum cape, & sic amitti possit de facili, & hoc ita, si nulla præcessit assisa novæ disseysinæ; & si præcessit recenter, tunc videri poterit per assisam quæ & qualis fuerit communia pasturæ, quæ petitur. Item quòd servitium ei faceret certum scilicet tale vel tale. Servitium autem multiplex esse poterit, in denariis, mensuris, falcationibus, arruris, operibus, consuetudinibus, & præstationibus variis, dum tamen certis & determinatis, & certis temporibus & terminis, dum tamen non ad voluntatem accipientis indeterminatè, aliquando plus aliquando minus: quia si ita esset, ibi esset potiùs precium pro herbagio quam communia. Si autem, cùm jus non habeat pascendi, herbam paverit per eschapium vel cum warda facta, & propter hoc denarios dederit vel servitium fecerit, hoc erit potiùs emenda pro transgressione, quàm servitium pro communia. Item si vicinitas vel servitium non intervenerint, docere oportet intervenisse donationem & titulum. Item docere oportet longum tempus & longum usum, illum videlicet qui excedit memoriam hominum, tale enim tempus

Britton, *ib.* § 3.

Britton, *ib.* § 7.

Azo, 59, No. 1.

has essoined himself, he shall be attached as in a personal action, because in this case pasture is not claimed as by a writ of right, as will be explained below. But if he has come, he may show by what right he claims common of pasture, as if they have commoned together, to wit, one with the other by common consent from ancient time. But when after all distraints he has once appeared, then let it be forthwith inquired by the justiciaries, if the party impleaded claims a right of common, and he may answer that he does not, or that he claims pasturage, and then let it be inquired what sort of common, and the common having been specified, then let proceedings be taken as in a writ of right, and from that time if he makes default, let the pasture be taken into the hand of the lord the king by the little *cape* until he has appeared, and so it may be easily lost, and this in such manner, if no assise of novel disseysine has preceded; but if it has recently preceded, then it may be seen from the assise what and what sort of common of pasture it is, which is claimed. Likewise that he has done him a certain service, to wit, of this kind or of that kind. But a service may be of many kinds, in money, measures, reapings, ploughings, workings, customs, and various lendings, provided they are certain and determinate, and at certain times and terms, provided they are not at the pleasure of the receiver indeterminately, sometimes more and sometimes less; because if it were so, it would rather be a price for the herbage than a right of common. But if when he had no right of feeding on the grass he has fed on the sly or with a guard kept, and on such account he has given money or has done a service, this will rather be an amends for a trespass than service for commonage. Likewise if vicinity or a service has not intervened, he ought to show that a donation and a title have intervened. He ought likewise to show long time and long user, such for instance as exceeds the memory of man,

f. 230 b. sufficiat pro jure, non quia jus deficiat, sed quia actio deficit vel probatio. Item sufficit pro jure, si ille de quo queritur docere possit, quòd aliquando simul communicaverint, licet nunc non communicent, ut si querens per negligentiam suam vel suorum communiam suam amiserit, ut si vicinus partem suam excoluerit & appropriaverit, quòd vicinus sibi & negligentiæ suæ merito poterit imputare. Cùm autem querens ad objecta respondeat contrarium vel diversum, hoc per patriam in modum inquisitionis declarabitur, s. per hæc verba. Si talis querens & homines sui & ille de quo queritur, & homines sui de tali villa semper simul communicare solent in tali loco & tali. Item si tale servitium fecerint & tale &c. Item si talis à tali tempore quo non extat memoria semper pacificè habuit communiam &c. Item si taliter feoffatus fuit (ut dicit) cum communia pasturæ. Item si illam emit &c., & infinitæ sunt causæ quare communiam &c. Et secundùm quòd per patriam probatum fuerit amittetur communia vel retinebitur. Et notandum, quòd si tenementa talium sint in eadem baronia & de eodem feodo & in una villa, non poterit quis communiam dedicere inter vicinos propter vicinitatem, nisi hoc faciat aliquod speciale, ut de termino P. anno xv. in com̃ Buck. Item si recognitum sit in judicio ab eo qui communiam clamat, quod tenens terram in qua com̃unia petitur illam includere possit, & arare & in ea ædificare vel aliquid facere pro voluntate sua, cadit breve Quo jure: ut de termino S. Michaelis, anno septimo incipiente octavo, in principio rotuli. Item si ponere possit tenens implacitatus in magnam assisam

Britton, *ib.* § 10.

for such a time suffices for right, not because right fails, f. 230 b.
but because an action fails or proof. Likewise it suffices for right, if he about whom complaint is made can show that they have once commoned, although they do not now common, as if the claimant by the negligence of himself or of his people has lost his right of common, as if his neighbour has cultivated and appropriated his part, which his neighbour may deservedly impute to himself and to his own negligence. But when the claimant replies what is contrary or diverse to the objections, this shall be declared through the country in the manner of an inquisition, to wit, by these words. If so-and-so, the complainant and his people, and the person against whom the complaint is made and his people of such a vill have always been accustomed to common together in such and such a place. Likewise if they have done such and such service. Likewise if so-and-so from such a time beyond memory has always had peaceably right of common, &c. Likewise if he has been enfeoffed in such manner (as he says) with a common right of pasture. Likewise if he has purchased it; and there are infinite reasons why he should have a right of common. And according to what has been proved by the country his right of common shall be lost or retained. And it is to be noted, if the tenements of such persons are in the same barony and in the same fee and in the same vill, a person cannot gainsay a right of common between neighbours on account of vicinity, unless he do this under some special saving, as in Easter term, in the fifteenth year, in the county of Buckingham. Likewise if it be recognised in the judgment by him who claims a right of common, that the tenant of the land in which the common right is claimed may enclose it and plough it and build on it, or do anything according to his pleasure, the writ of *Quo jure* fails: as in St. Michael's term, in the seventh and eighth years, at the beginning of the roll. Likewise the tenant, if he is impleaded,

ad recognoscendum utrum ipse majus jus habeat tenendi terram suam, sive tenementum, sive communiam, quàm idem petens ibi habere & clamare possit, quàm ille qui petit habendi communiam pasturæ in eadem sicut illam petit, vel e contrà. Et notandum, quòd si quis de communia pasturæ suæ fuerit disseysitus, & perquisiverit sibi per breve de nova disseysina, & ille disseysitor incontinenti sibi perquisiverit per breve Quo jure, semper procedet assisa de disseysina sicut in aliis placitis, ut secundùm quod seysina querenti remanserit vel non, procedat placitum per breve Quo jure, vel non procedet: ut de termino P. anno decimo octavo in com̃ Sussex. inter Simonem de la Pynd & Johannem Kynelworth & alibi. Eodem vero modo fieri posset (ut prædictum est) de omni genere communiæ quæ in alieno haberi potest, si hoc esset in usu, quòd amittere deberet quis possessionem, nisi docere posset de jure. Cùm autem recognitum sit & convictum per juratam vel alio modo, quòd summonitus nullam communiam habere debeat, tunc habebit querens pacem per tale breve, Rex vic. salutem. Scias quòd cùm A. summonitus esset in curia nostra, &c. ad respondendum B. quo jure ipse communiam clamat in terra ipsius B. in tali villa desicut idem B. nullam communiam habuit in terra ipsius A. in eadem villa vel in alia tali villa, nec idem A. ei servitium fecit, quare communiam habere debuit. Idem A. venit hîc in eadem curia, & auditis partium hinc inde interrogationibus et responsionibus, tandem consideratum est in eadem curia nostra &c. coram eisdem justitiariis
f. 231. nostris, quòd prædictus A. nullam communiam habere poterit vel exigere in terra ipsius B. in prædicta villa sine voluntate ipsius B. Et ideò tibi præcipimus, quòd eidem B. terram suam in prædicta villa de N. in pace

may put himself upon the great assise to recognise whether he has a greater right to hold his land or his tenement, or his common, than the party claiming can there have or claim, than he who claims to have a common right of pasturage in the same such as he claims, or the contrary. And it is to be noted, that if a person has been disseysed of his common right of pasturage, and has provided himself with a writ of novel disseysine, and the disseysor has forthwith provided himself with a writ of *Quo jure*, the assise of disseysine shall always proceed as in other pleas, that according as the seysine has remained with the claimant or not, the plea by the writ of *Quo jure* shall proceed or not, as in Easter term, in the eighteenth year, in the county of Sussex, between Simon de la Pynd and John Kynelworth, and elsewhere. But in the same way it may be done (as above said) in regard to every kind of common, which may be had in another person's ground, if it be in use that a person ought to lose possession, unless he can show his right. But when it has been recognised and convicted by a jury or in some other manner, that the party summoned ought to have no right of common, then the claimant shall have peace by a writ of this kind. The king to the viscount greeting. Know that when A. was summoned in our court, &c., to answer to B. by what right he claims common in the land of B. in such a vill, since B. has no right of common in the land of A. in the same vill or in another such vill, nor has A. done for him any service wherefore he ought to have a right of common. The said A. came here into court, and the interrogatories or answers of the parties on one side and the other having been heard, it was at last resolved in our said court and before our said justiciaries, that the aforesaid A. had no right of common nor could exact it in the land of the said B. in the aforesaid vill without the consent of the said B. And therefore we enjoin you, that you cause the said B. to have the peaceable enjoyment f. 231.

habere facias, ita quòd prædictus A. nullam ibi communiam habeat sine voluntate ipsius B. Teste &c.

Cap. XLI.

1. De communia habendi rationabile estoverium in fundo alieno, in boscis et brueriis et aliis in vastis alicujus.

Dictum est supra de communia pasturæ & jure pascendi in alieno, nunc autem dicendum est de alia communia, secundùm quod largè se habeat una cum alio non ad pastum sed ad commoditatem aliam, ut si quis habere debeat in fundo alieno jus secandi vel falcandi in foresta vel bosco alicujus, vel aliis vastitatibus ad rationabile estoverium suum, ædificandi scilicet, claudendi, & ardendi, & alia quidem quæ necessaria sunt, secundùm constitutionem servitutis in plus vel minus, in qua quidem constitutione oportet modum attendere, ut estoverium sit rationabile secundùm quantitatem bosci vel vasti in quo fuerit servitus constituta, secundùm quod fuerit ampla vel parva, sicut illam petit vel e contra. Item quantitas tenementi, ad quod debetur illa servitus, & sic oportet omnia ponderare, quòd non excedant modum nec minuantur, sed quòd omnia permaneant in mensura. Et si aliquis ipsorum modum excedere voluerit vel minuere, scilicet ille ad quem servitus pertinet plus capiendo quàm ratio permittat vel quàm liceat, & sic faciat vastum & destructionem, dominus ille, cujus fundus fuerit, procuret amensurationem, vel agat de transgressione vel disseysina. Et eodem modo ille cui servitus debetur, si per dominum fundi minuatur vel omninò tollatur, agat ad hoc per breve, q ei uti liceat plenè vel saltē

Britton, ii. ch. xxix. § 1.

of his land in the aforesaid vill of N., so that the aforesaid A. shall have no common therein without the consent of B. Witness &c.

Chapter XLI.

1. Of a common right of having reasonable estovers in the ground of another, in his woods and heaths and other of his wastes.

We have spoken above of common of pasture and the right of pasturage on another person's ground, now we must speak of other rights of common according to what may exist extensively together with another person not for feeding but for other conveniences, as if a person ought to have a right in another person's ground of cutting or lopping in the forest or wood of another, or in other waste places for reasonable estovers for the purpose of building, to wit, of enclosing and of burning, and certain other things which are necessaries, according to the constitution of the servitude for more or for less, in which constitution indeed it is incumbent to observe moderation, that the estover shall be reasonable according to the quantity of the wood or the waste in which that servitude is appointed, according as it is great or small, as he claims it, or the contrary. Likewise the quantity of the tenement, to which that servitude is due, and so it is incumbent to weigh everything that they do not exceed moderation, nor are diminished, but that all things remain in [due] measure. And if any one of them wishes to exceed moderation or to diminish, to wit, he to whom the servitude appertains by taking more than reason permits or than is allowable, and so causes waste and destruction, let the lord whose ground it is procure an admeasurement, or bring an action for trespass or for disseysine. And in the same way he to whom the service is due, if it be diminished or altogether taken away by the lord of the ground, let him proceed by a writ that he may be allowed to enjoy it fully or at least conveniently, and by this writ directed to the viscount

commodè, & per hoc breve vic. directum q vocaī justicies, q tale est. Rex vic. salutē. Præcipimus tibi q justicies talem q justè &c. permittat talem habere rationabile estoverium suū in bosco suo de tali villa, q habere debet & solet (ut dicit), & sicut rationabiliter monstrare poterit q habere debeat, ne ampliùs inde clamorem audiamus pro defectu justitiæ. T. &c. Si autem estoverium petatur de turbaria vel bruera, tūc sic. Rex vic. salutem. Præcipimus tibi, q justicies talem quòd justè &c. permittat talem habere rationabile estoverium suum in turbaria sua vel bruera, vel aliis hujusmodi q in ea habere debet & solet ut dicit, ne ampliùs &c. Et locum habere posset (ut videtur) assisa novæ disseysinæ de qualibet communia pertinente ad liberum tenementum, secundùm q communia largè se habeat, sicut habere potest locum in cōmunia herbagii & pessonæ, non video rationem quare non, & sic de aliis omnibus communiis inferiùs notādis. Si autem boscus vel vastitas communis sit inter participes vel cohæredes, & aliquis eorū in estoverio capiendo modum excedat, & vastū fecerit vel distructionē, non erit hic locus amensurationi nec novæ disseysinæ sed transgressioni, ut assisa vertaī in transgressionem, vel q partes sic compellanī ad divisionem per communi[1] dividendo judicium. Et eodem modo (ut prædictum est) fiat de jure fodiendi, falcandi & secandi, & de aliis quibuscunq; servitutibus.

Britton, ii. ch. xxix. § 2.

f. 231 b.

Cap. XLII.

1. De aquæ ductu.

Item potest quis habere servitutem, scilicet jus aquæ ducendæ ex fundo alieno, & per fundum alienum usq; ad fundum proprium ad irrigandum agrum suum, vel

[1] "communem," MS. Rawl. C. 160.

which is called a *justicies*, which is of this kind. The king to the viscount greeting. We enjoin you that you require such a person to permit so-and-so justly &c. to have reasonable estovers in his wood in such a vill, which he ought to have and is accustomed (as he says) to have, and as he can reasonably show you that he ought to have, that we may no more hear a complaint thence from defect of justice. Witness, &c. But if the estover be claimed of turbary or heather, then thus. The king to the viscount greeting. We enjoin you that you require such a person that he permit lawfully &c. so-and-so to have his reasonable estovers in his turbary land and in his heath, or in other things of this kind, which he ought to have and is accustomed to have as he says, that no more complaint be made &c. And, as it seems, an assise of novel disseysine may have place concerning any right of common appertaining to a free tenement, according as the right of common may be extensive, as it may have place in a common of herbage and of beech-mast, I do not see any reason wherefore not, and so of other rights of common to be noted hereafter. But if the wood or the waste be common amongst parceners or coheirs, and any one of them exceeds moderation in taking his estovers, and causes waste or destruction, there will not here be place for an admeasurement nor for a novel disseysine, but for a trespass, so that the assise may be converted into a trespass, or that the parties may thus be compelled to a division by a judgment for dividing the common. And in the same way (as aforesaid) let it be done concerning the right of digging, reaping, and cutting, and concerning any other servitudes whatsoever. f. 231 b.

Chapter XLII.

1. Concerning a watercourse.

Likewise a person may have a servitude, to wit, a right of conducting water from one person's ground and through another person's ground as far as his own

ad aliud commodum faciendum, quo casu impediri non debet, quo omninò ducere non possit vel quo minùs commodè vel modo debito secundùm consuetudinem servitutis, ut si ducere debeat omni tempore, & non permittit eum ducere, nisi aliquo tempore. Item si certis temporibus, non permittit eum ducere aliquo tempore. Item si non in debita quantitate. Itē si non ꝑmittat alveum purgare ꝑ ꝙ aquæ ductus impeditur, & per hoc tenementa vicinorum submerguntur, in omnibus istis casibus fit disseysina vicino & consulitur ei per breve: Quare talis divertit cursum aquæ ad nocumentum liberi tenementi sui, per breve quod tale est. Nocumenta verò infinita sunt, secundùm quod inferiùs dicetur, quæ omninò servitutes tollūt, vel saltem impedimentum dant, quò minùs commodè uti possit servitutibus.

Britton, ii. ch. xxx. § 1.

Cap. XLIII.

1. De nocumentis injuriosis.

Et sciendum quòd nocumentorum aliud injuriosum est & damnosum, aliud damnosum & non injuriosum, unde cùm fiat querela de nocumento, quæri oportet ad quod damnum aliquid fiat, & videndum utrum damnosum & injuriosum sit, & tunc tollendum. Si autem non injuriosum, licet damnosum, tunc erit sustinendum, sicut videri poterit, si quis servitutem habeat & jus pascendi in alieno, competit ei liber ingressus & egressus. Si autem ille, cujus fundus fuerit, aliquid faciat in ingressu, quò minus omninò ingredi possit vel minus commodè, ut si murum, fossatum, vel hayam fecerit, facit nocumentum injuriosum, & quod ita fac-

Britton, ii. ch. xxx. § 2.

ground to irrigate his own fields, or to serve some other convenience, in which case he ought not to be hindered from altogether conducting the water, or from conducting it conveniently and in due manner according to the custom of the servitude, as if he ought to conduct it at all times, and he only permits him to conduct it at a particular time. Likewise if at certain times, he does not permit him to conduct it at a particular time. Likewise if not in due quantity. Likewise if he does not permit him to cleanse the channel by which the water-course is impeded, and thereby the tenements of the neighbours are inundated; in all these cases a disseysine is worked against the neighbour, and he is assisted by a writ: wherefore such a person diverts the water-course to the nuisance of his free tenement, by a writ which is of such kind. But nuisances are infinite, according to what will be said hereafter, which take away all servitudes, or at least cause an impediment, that a person cannot conveniently enjoy the servitudes.

Chapter XLIII.

1. Of tortious nuisances.

And it is to be known that of nuisances one is tortious and hurtful, and another hurtful but not tortious; hence when a complaint is made concerning a nuisance, it ought to be inquired to what hurt does anything lead, and it is to be seen whether it is hurtful and tortious, and then it is to be removed. But if it be not tortious, although hurtful, then it must be supported, as may be seen, if any person has a servitude and a right of pasturage in another person's ground, he is entitled to free ingress and egress. But if the person, whose ground it may be, does anything at the entrance, whereby one cannot enter at all or not so conveniently, as if he has raised a wall or a foss or a hedge, he works a tortious nuisance, and what has been so done, may forthwith, and whilst

tum est, statim & recentèr flagrante facto tolli potest & demolliri, etiam sine brevi, post tempus verò non nisi cum brevi. Eodem modo fieri debet, si cui concedatur jus eundi per fundum alienum, si via quocunque modo obstruatur vel coarctetur, quò minus iri possit omninò vel minus commodè. Item si aquæ ductus concedatur (ut prædictum est) & divertatur ad nocumentum in parte vel in toto. Item poterit quis habere communiam cum alio, & jus fodiendi sicut jus pascendi, ut fodere possit in alieno aurum & argentum, stannum, cretam, lapides & arenam & hujusmodi. Et eodem modo jus venandi & piscandi, potandi & hauriendi, & alia plura quæ infinita sunt cum eorum pertinentiis, scilicet cum libero accessu & recessu, secundùm quod ad communiam pasturæ pertinet, liber ingressus & competens & liber egressus. Et in omnibus casibus prædictis & aliis multis casibus jaceret assisa novæ
f. 232. disseysinæ eodem modo, sicut de communia pasturæ, & etiam eodem modo Quo jure, si hoc esset in usu.

2. De nocumentis injuriosis. De servitutibus.

Item si servitus imponatur fundo alicujus à jure, licet non ab homine ut supra, per quam prohibetur ne quis faciat in suo per quod nocere possit vicino, ut si stagnum exaltaverit in suo vel de novo fecerit, per quod noceat vicino, i. si per hoc fundus vicini submergatur, hoc erit ad nocumentum liberi tenementi vicini injuriosum, nisi hoc à vicino permissum sit quòd liceat. Et sicut poterit quis habere servitutem in fundo vicini si constituatur, ita poterit etiā per longum usum sine constitutione ex scientia & patientia dominorum, quia longa patientia trahitur ad consensum, sicut in communibus pasturis & hujusmodi. Item id quod ab initio non fuit nocumentum injuriosum, ex

the act is recently flagrant, be taken away and demolished, even without a writ, but after a time not, except with a writ. In the same way it ought to be done if any one has had granted to him the right of going across another person's ground, if the road be in any way obstructed or narrowed so as to prevent him going at all, or going so conveniently. Likewise if a water-course be granted (as aforesaid) and it be diverted as a nuisance in part or in whole. Likewise a person may have a right of common with another, and the right of digging just as the right of pasture, so that he may dig for gold and silver, tin, chalk, stone, or sand and such like. And in the same manner the right of hunting and of fishing, of drinking and of drawing water, and several other things which are infinite with their appurtenances, to wit, with free ingress and egress, according to what appertains to common of pasture, free and suitable ingress and free egress. And in all the aforesaid cases and in many other cases an assise of novel disseysine would lie in the same way as for common of pasture, and also in the same manner *quo jure*, if this were in use. f. 232.

2. Of tortious nuisances concerning servitudes.

Likewise if a servitude be imposed upon the ground of another by right and not by men as above, by which it is prohibited that a person may not do in his own land that which may be a nuisance to his neighbour, as if he should have heightened a pond in his ground or made one anew, through which he works a nuisance to his neighbour, that is, if thereby his neighbour's ground is put under water, this will be a tortious nuisance to the free tenement of his neighbour, unless it has been permitted by his neighbour that he may do it. And as a person may have a servitude in the ground of a neighbour if it be appointed, so he may it by long use without an appointment with the knowledge and sufferance of the lords, because long sufferance is taken for consent, as in common pastures and such like. Likewise that which at the commencement was not a tortious nuisance,

post facto & per constitutionem fieri poterit injuriosum, ut si cui ab initio facere licuit in suo, ex constitutione servitutis convenerit ne liceat facere, vel e contrariò, si cui ab initio facere non liceat, post modum facere liceat ex constitutione.

Cap. XLIV.

1. De nocumentis injuriosis et pertinentiis pertinentiarum.

Omnia jura prænotata & omnes servitutes sunt de pertinentiis tenementorum, & pertinent à tenemento ad tenementa, & habent hujusmodi pertinentiæ suas pertinentias, sicut ad jus pascendi & ad pasturam pertinet via & liber ingressus & egressus. Et eodem modo ad jus fodiendi, falcandi, & secandi, hauriendi, potandi, piscandi, venandi, & hujusmodi, liber accessus & recessus, scilicet via, iter, & actus ratione diversorum usuum, ut supra. Item ad jus aquæ[1] ducendæ pertinet purgatio. Item ad iter, secundùm quod est de pertinentiis pertinentiarum, vel de pertinentiis per se, ut si via per se concedatur sine alia servitute, pertinet refectio sicut ad aquæ ductum pertinet purgatio. Et sicut possunt hujusmodi jura & servitutes auferri per disseysinam ne quis utatur: ita possunt fieri nocumenta injuriosa in pertinentiis pertinentiarum, quòd quis commodè uti non possit prædictis servitutibus vel quòd omninò uti non possit, ut si quis omninò viam obstruat vel chaceam, per quam ingredi solet pasturam, fossato, muro, haya, vel palatio,[2] tale nocumētū non multum differt à disseysina, & ideò tolli debet per assisam novæ disseysinæ cùm sit injuriosum, ad custum

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[1] "Item ad jus aquæ." What follows is inserted in MS. Rawl. C. 160 after the passage "quare divertit cursum aquæ" in the next following chapter.

[2] "vel pallicio," MS. Rawl. C.160.

may become tortious after the act and by an appointment, as if it has been allowed to any one from the commencement to do a thing on his own ground, it may be agreed upon by the appointment of a servitude that he shall not be allowed to do it; or on the contrary, if it has not been allowed from the commencement, it may afterwards be allowable from an appointment.

Chapter XLIV.

1. Of tortious nuisances and appurtenances of appurtenances.

All the rights above noted and all the servitudes are concerning the appurtenances of tenements, and appertain from tenement to tenement, and appurtenances of this kind have their appurtenances, as a road and free ingress and egress appertain to pasturage. And in the same way to a right of digging, lopping and cutting, drawing water, drinking, fishing, hunting, and such like, a free approach and retreat, to wit, a road, a path, and a bridle way, by reason of diverse uses, as above. Likewise the right of cleansing appertains to the right of drawing water. Likewise to a path, according to what is concerning the appurtenances of appurtenances, or concerning appurtenances themselves, as if a road has been granted without any other servitude, the repair of the road appertains to it as cleansing appertains to a water-course. And as rights and servitudes of this kind may be taken away by disseysine so that a person may not enjoy them, so tortious nuisances may be worked in the appurtenances of appurtenances, so that a person may not be able to use conveniently the aforesaid servitudes, and not to use them at all, as if a person should obstruct a road or a drove way, by which a person is accustomed to enter a pasture-ground, by a foss, a wall, a hedge, or a palisade, such a nuisance does not much differ from a disseysine, and therefore ought to be removed by an assise of novel disseysine, since it is tor-

ejus qui opus illud fecerit, si hoc fecerit in suo. Si autē in aliēo, cōpetit ei assisa novę disseysinę de libero teñto, cujus fuerit fundus in quo opus illud factū fuerit, & secundū q assisa novę disseysinę sub se cōtinet nocumētū, q̃a omnis disseysina nocet, p hoc tolli potest nocumentum & querenti restitui damnum, tam de disseysina teñti quàm de nocumento, quod quidem non esset, si tantùm de nocumento ageretur. Item si minus commodè ire possit ad locum servitutis & ad pasturam, ut si viam coarctaverit, vel ubi solebat ire per compendium, compellit eum ire per circuitum. Item etsi permittat eum ire, tamen non permittat eum ire ad usum debitū in servitute cōstitutū, ut sit, si
f. 232 b. debet quis habere viā ad carrectā & carrum, non permittit eum habere nisi iter & actum, & ingressum strictum, per assisam tollatur injuriosum nocumentum, & per breve: Quare obstruxit vel coarctavit aliquo modorum supradictorum, & si fossatum non fecerit nec murum per quod obstruat per opus manufactum, sufficit tamen si faciet quod tantundem valeat, scilicet si ire non permittat, & hæc locum habent, cùm facta fuerint extra loca deputata servitutibus. Si autem infrà, tunc locum habebit assisa novæ disseysinæ de pastura ut supra. Item à constitutione hominum imponitur servitus, quòd quis habeat aquæ ductum per fundum alienum, & sic est constitutio hominis. Est etiam constitutio juris, ne quis faciat in suo injuriosè, scilicet ne stagnum faciat vel exaltet, vel prosternat per quod noceri possit vicino, ut si per refluxum aquæ submergat tenementum vicini sui. Eodem modo nec domum, nec pontem, stagnum, nec gurgitem exclusum[1] nec molendinum, per quod vicino injustè noceatur, & sic ne faciat nocumentum injuriosum in construendo

[1] "exclusam," MS. Rawl. C. 160.

tious, at the cost of him who has put up the work, if he has done it on his own ground. But if it has been done on another's ground, he to whom the ground belongs on which it has been done, is entitled to an assise of novel disseysine concerning his freehold, and according as an assise of novel disseysine contains under it a nuisance, because all disseysine hurts, the nuisance may be removed by this, and the loss restored to the complainant, as well what results from the disseysine as what results from the nuisance, which would not be the case, if proceedings were had only for the nuisance. Likewise if he can less conveniently go to the place of the servitude and to the pasture, as if he has narrowed the road, or where he was accustomed to go by a short cut, he is now obliged to go circuitously. Likewise, if he permits him to go, yet he does not permit him to go for the due use appointed in the servitude, as if a person ought to have a road for a cart or a car, and he does not permit him to f. 232 b.
have more than a footpath or a bridle way, and a narrow ingress, the tortious nuisance may be removed by an assise and by a writ "Wherefore he has obstructed or nar-" rowed the road, in any of the modes above mentioned, and if he has not made a foss nor a wall whereby he obstructs by a work made with hands, it is sufficient if he does that which is equivalent, to wit, if he does not permit him to go; and these writs have place when the things are done outside the places deputed for the servitudes. But if within them, then a writ of novel disseysine concerning the pasturage will have place as above. Likewise a servitude is imposed by the appointment of men, that a person shall have a water-course through another's ground, and so it is an appointment of man. There is also an appointment of right, that a person may not act on his own ground tortiously, for instance that he may not make or heighten a pond, or cut down (trees) whereby a nuisance may be caused to a neighbour, as if by the flowing back of the water the tenement of his

in proprio vel alieno, nec eodem modo in prosternendo, demolliendo vel destruendo injuriosè omninò quod juste factum est ab initio & levatum, ut si murum prostraverit quis, vel fossatum, piscariam vel stagnum exclusum, pontem, & hujusmodi. Et eodem modo facere potest quis nocumentum injuriosum vel potiùs disseysinam, si quis in reficiendo demolliendo vel amensurando, cùm hoc ei liceat justè, si modum debitum excedat. Et sicut poterit quis facere nocumentum injuriosum in faciendo, ita poterit in non faciendo, in proprio vel in alieno, ut si teneatur ex constitutione obstruere & claudere, purgare & reficere, & non fecerit, cùm ad hoc teneatur. Item sicut nocere potest in non faciendo, ita nocere potest in non permittendo, ut si quis non permittat alium qui tenetur obstruere, claudere, purgare, & reficere, cùm ad hæc teneatur ex constitutione, vel longa consuetudine. Item notandum, quòd poterit esse nocumentum injuriosum propter communem & publicam utilitatem, quod quidem non esset propter utilitatem privatam, ut si quis firmaverit piscariam vel stagnum habens prædia ex utraque parte aquæ, cùm fundus suus liber sit ex omni parte quod nihil debet fundo vicino, subtus nec supra, per hoc licet damnum faciat vicinis, non tamen facit injuriam, sed tamen propter publicam utilitatem (quæ privatæ præfertur) sustinenda sunt hæc ad tollendum publicum damnum. Et multa alia fieri possunt nocumenta injuriosa, secundùm quod in parte dicetur infrà, sed hoc, quod dictum est, sufficiat ad præsens exempli causa.

neighbour should be submerged. In the same way neither a house nor a bridge, a pond nor a weir, a sluice nor a mill, by which a nuisance may be caused to a neighbour, nor let him cause a tortious nuisance in constructing it on his own or on another person's ground, nor in the same way in throwing it down, demolishing or destroying tortiously what has been justly constructed and raised originally, as if a person should throw down a wall or a foss, or a fishery or an open pond, a bridge or such like. And in the same way a person may cause a tortious nuisance, or rather a disseysine, if in repairing, demolishing, or in admeasuring, when this is justly allowable to him, if he does not exceed the due measure. And as a person may cause a tortious nuisance in doing a thing, so he may in not doing a thing, on his own ground or on another person's ground, as if he be bound by an appointment to obstruct and to close, to cleanse and to repair, and he does not do it, when he is bound to do it, from an appointment or from long custom. And it is to be noted that there may be a tortious nuisance on account of a common and public interest, which would not be on account of a private interest, as if a person should have let a fishery or a pond, having the tanks on each side of the river, when his own ground is free in all parts that it owes nothing to the next ground, below or above, although he thereby does harm to his neighbours, he does not work any wrong to them, but nevertheless on account of the public interest (which is preferred to private interest) these things are to be removed to take away the public damage. And many other tortious nuisances may be caused according to what will be partly discussed below, but what has been said, may suffice for the present.

Cap. XLV.

f. 233.

1. Quod ea, quæ injuriose levata sunt ad nocumentum, statim demolliri possunt et recenter.

Ea verò, quæ sic levata sunt ad nocumentum injuriosum, vel prostrata vel demollita, statim & recenter flagrante maleficio (sicut de aliis disseysinis) demolliri possunt & prosterni, vel relevari & reparari, si querens ad hoc sufficiat, si autem non, recurrendum est ad eum qui jura tuetur, qui per tale breve remedium habebit.

2. Breve de hujusmodi. Supra, fol. 179. Glanville, l. 13. ch. 35.

Rex vicecom̃ salutem. Questus est nobis talis quòd talis injustè & sine judicio levavit quendam murum, quoddam fossatum, quandam hayam, quoddam palicium,[1] quandam domum, quandam portam, quendam pontem, quoddam stagnum, quandam exclusam, quendam gurgitem, quoddam molendinum, quandam faldam in tali villa ad nocumentum liberi tenementi sui in eadem villa vel alia, post ultimum reditum nostrū de Britannia in Angliam.[2] Et ideò tibi præcipimus quòd loquelam illam audias, & postea eū inde justè deduci facias, ne amplius &c. Teste &c. Eodem modo vice versa fieri poterit breve de prædictis, quare quis hm̃odi prostravit injustè ad nocumentum liberi tenementi &c. Item quare stagnum exaltavit. Item eodem modo quare quis viam obstruxit vel coarctavit ad nocumentum. Item quare divertit cursum aquæ. Item si quis aliquid fecerit quo minus ad fontem, lacum, puteum, piscenam[3] iri possit vel hauriri vel de fontana aquæ non tantam aquam ducere vel haurire, tales cadere possunt in assisam, sed discretæ sunt servitutes ductus aquæ & haustus. Item si quis prohibeatur aqua uti. Item haurire, sive pecus ad aquam appellere cadit similiter in assisam, sed hoc non est de cisterna, quia

[1] "pallicium," MS. Rawl. C. 150.

[2] See Coke, 2 Inst. 95. The limitation of time for bringing certain writs is discussed in the Introduction.

[3] "piscinam," MS. Rawl. C. 160.

Chapter XLV.

f. 233.

But those things which have thus been raised to cause a tortious nuisance, or have been thrown down or demolished, may be immediately and recently whilst the misdeed is flagrant (as in the case of other disseysines) be demolished and thrown down, or raised up again and repaired, if the complainant is sufficient to do it, but if not, he must have recourse to him who protects rights, who shall have a remedy by such a writ as this.

1. That those things, which have been tortiously raised as a nuisance, may be immediately demolished and recently.

The king to the viscount greeting. Such a person has complained to us that so-and-so unjustly and without a judgment has raised a certain wall, a certain foss, a certain hedge, a certain paling, a certain house, a certain gate, a certain bridge, a certain sluice, a certain weir, a certain mill, a certain fold in such a vill to the nuisance of his freehold in the same vill, or in another since our last return from Britanny to England. And therefore we enjoin you that you hear that argument, and afterwards cause him to be justly dealt with, that we may hear no more complaints, &c. Witness, &c. In the same way conversely a writ may be issued concerning the matters aforesaid, wherefore a person has levelled anything unjustly to the nuisance of the freehold, &c. Likewise why he has heightened his pond. Likewise in the same way, wherefore he has obstructed a road or narrowed it so as to cause a nuisance. Likewise why he has diverted a water-course. Likewise if a person has done anything to prevent him going to a fountain, a lake, a well, a fish-pond, or drawing water from it, or from conducting or drawing so much water from a fountain, such persons are liable to an assise, but the servitudes of a water-course and of drawing water are different. Likewise if a person be prohibited from using water, likewise from drawing it, or driving his cattle to it, he is liable in a similar manner to an assise; but this does

2. A writ of this kind.

cisterna non habet aquam perpetuam nec aquam vivam, quia cisterna imbribus concipitur, sed & lacus, piscina, puteus aliquando aquam vivam non habent. Item si quis ire ad fontem prohibetur, habet actionē, Quare quis obstruxerit, quia cui concediť haustus, ei conceditur iter ad fontem & accessus, & licet quis uti possit, tāmen novas venas querere & aperire non licet, quia aliter uti non potest quàm alio anno uti solet. Rivus autem locus est per longitudinem depressus, quo aqua decurrat. Specus est locus ex quo despicitur, & inde dicta sunt spectacula. Reficere autem est, id quod corruptum est in pristinum statum reformare. Ei verò permittitur reficere & purgare rivum, qui jus habet servitutis, & qui aquæ ducendæ causa id fecit. In pristinum statum dico, quia si quis rivum deprimit vel attollit, dilatat vel extendit, operit apertum vel qua[1] per excessum delinquit. Item aquæ ductus quandoq; debetur & datur prædiis, & quandoq; personis. Quod verò prædiis datur, persona extincta non extinguitur. Quod autem datur personis, cum personis amittitur, ideò ad nullum transit successorem. Si diurnarum vel nocturnarum horarum aquæ ductum habeam, non possum aliis horis ducere quàm quibus jus habeam. Item aqua dividi poterit non solum temporibus sed mensuris. Et sciendum q̄ si aliquis fecerit in uno cōm̄ aliquid quod noceat in alio cōm̄, semper impetrabit breve ad vic. illius cōm̄, in quo cōm̄ nocumentum illud factum fuerit. Et sic pertinet quandoq; hujusmodi emendatio ad vic. per prædictum breve. Et eodem modo de via obstructa, per breve quòd justiciet per[2] com-

Dig. XLIII., tit. xxi. l. i § 2.

[1] "vel contra," MS. Rawl. C. 160. | [2] "propter," id.

not apply to a cistern, because a cistern has not water perpetually nor spring water, because a cistern is fed with rain water, but also a lake, a fish pond, a well sometimes have no spring water. Likewise if a person is prohibited from going to a fountain, he has an action, "wherefore he has obstructed him," for he, to whom water has been granted, has had granted to him a way to the fountain and access to it, and although a person may use it, he is nevertheless not allowed to search for and to open new veins, because he cannot use it otherwise than he is accustomed to use it in another year. But the bed of a stream is a place depressed in length, down which water runs. *Specus* is a place, out of which one looks down, and spectacles are so named. But to repair is to restore to its primitive state that which has become decayed. But it is permitted to him who has a right to a servitude, and who does it for the sake of a water-course, to repair and cleanse the bed of a stream. I say to its primitive state, because if a person lowers or raises it, he dilates or extends the bed of a stream, he closes what is open, or in some respect through excess is in fault. Likewise a water-course is sometimes due and given to fields, and sometimes to persons. But what is given to fields is not extinguished, when the person is extinguished. But what is given to persons is lost with the persons, accordingly it does not pass to a successor. If I have a water-course for the hours of the day or of the night, I cannot have the water run at other hours than those for which I have a right. Likewise water may be divided not only by times but by measures. And it is to be known that, if anybody does in one county any thing which works a nuisance in another county, he will always obtain a writ to the viscount of that county, in which the nuisance is worked. And so the correction of the nuisance sometimes appertains to the viscount by the writ aforesaid. And in the same way regarding the obstruction of a road, by a writ of *justicies* for the common

munem utilitatem, ne transeuntes ire diu impediantur,
f. 233 b. quia hoc esset commune damnum, & in hoc vicecom̃ & justiciarii faciant sicut super detentione averiorū contra vadium plegii, propter communem utilitatem ne animalia diu inclusa pereant. Eodem modo de pastura & piscaria, & de habendo rationabile estoverium in bosco, & bruera, & in quibus non habet potestatem cognoscendi sine waranto, nisi tantùm de via, sed sine brevi, dum tamen hoc fecerit recenter flagrante delicto ad querelam, sed post longum intervallum se intromittere non debet sine waranto nec sine brevi. Nec licitum erit vicecom̃ se intromittere sine brevi ultra tempus quod conceditur disseysito, & hoc non nisi cum consensu & querela ejus cui injuriatum est. Forma brevis vicecom̃ directi de via talis est.

3. Forma brevis de justiciando aliquem, quod permittat alium habere viam.

Rex vicecom̃ salutem. Præcipimus tibi, q̃ justicies talem q̃ justè &c. permittat talem habere quandam viam in terra sua de tali villa, quam in ea habere debet & solet (ut dicit) sicut rationabiliter monstrare poterit quod in ea habere debeat, ne amplius &c. Item aliquando de pastura vicecom̃ hoc modo. Præcipimus tibi q̃ justicies talem, q̃ justè &c. p̃mittat talem habere communiam pasturæ suæ in terra sua in tali villa, quam in ea habere debet (ut dicit), & sicut rationabiliter &c. Et eodem modo de piscaria.

4. De communia pasturæ et

Præcipimus tibi, q̃ justicies talem, quòd justè &c. permittat talem habere communiam piscariæ suæ in aqua sua de tali villa, quam in ea habere debet &

interest, lest travellers be too long impeded on their way, because this would be a common damage, and in this matter let the viscount and the justiciaries do as in the case of the detention of cattle against the bail of a surety, on account of the common interest, lest the animals should perish from being shut up too long. In the same way concerning a pasture and a fishery, and concerning the enjoyment of reasonable estover in a wood or in a heath, and in which he has not power of taking cognisance without a warrantor, except only regarding the right of way, but without a writ, provided however he did this whilst the offence is recent and upon complaint; but after a long interval he ought not to interfere without a warrantor, nor without a writ. Nor will it be allowable for the viscount to interfere without a writ beyond the time which is granted to a person disseysed, and this not unless with the consent and upon the complaint of him, against whom the tort has been worked. The form of writ addressed to the viscount concerning a right of way is of this kind. f. 233 b.

3. The form of a writ of judicially constraining a person to permit another to have a right of way.

The king to the viscount greeting. We enjoin you that you judicially compel so-and-so, that he shall justly, &c. permit such a person to have a certain way across his land from such a vill, which he ought and is accustomed to have (as he says), as he can reasonably show that he ought to have, that we may not hear any more complaint, &c. Likewise sometimes concerning a pasturage to the viscount in this manner. We enjoin you that you judicially compel so-and-so, that he shall justly, &c. permit such a person to have common of pasture in his land in such a vill, which he ought (as he says) to have in it, and as reasonably, &c. And in the same way concerning a fishery.

4. Concerning common of

We enjoin you, that you judicially compel so-and-so, that he should justly permit such a person to have common of fishery in his water in such a vill, which he ought (as

piscaria, et de officio vicecomitis.

Britton, ii. ch. xxxi. § 6.

solet (ut dicit) sicut rationabiliter &c. Breve autem de habendo rationabile estoverium vicecom̃ directum, q̃ justiciet ut supra. Breve autem de conventione vicecom̃ directum, q̃ justiciet infra. Officium verò vicecom̃ est in hac parte, q̃ in præsentia partium convenire faciat hundredum sive wapentakium. Et inprimis videat in cujus fundo sive tenemento illud opus novum factum fuerit, & si in fundo illius de quo queritur inveniatur factum injustè & ad nocumentum liberi teñti querentis, si hoc constiterit per juratam, vicecom̃ amovere faciat per visum recognitorum id q̃ nocet ad custū̃ delinquentis, & illud fieri faciat sicut esse solet & debet.

5. Breve, si rex voluerit, quod hujusmodi nocumenta terminentur coram justiciariis suis quibuscunque.

Rex vicecom̃ salutem. Questus est nobis talis, q̃ talis injustè &c. levavit quoddam fossatum vel quædam alia (ut suprà in primo bene per ordinem) in tali villa ad nocumentum liberi tenementi sui in eadem villa vel in alia post ultimum reditum &c. Et ideò tibi præcipimus, quòd si idem talis fecerit te securum &c. tunc facias duodecim liberos & legales homines de visineto illo videre fossatum illud, vel alia superiùs nominata, & teñtum illud & nomina eorum inbreviari. Et sum̃oneas eosdem per bonos sum̃onitores, q̃ sint corā̃ justiciariis nostris ad proximam assisam &c. parati inde facere recognitionem. Et pone per vadium & salvos plegios præfatum talem vel ballivum ejus &c. ut supra de nova disseysina de libero tenemento.

6. De visu faciendo.

De officio vicecom̃ & aliis fiat ut supra de assisa novæ disseysinæ de libero tenemento, præterquàm de visu juratoribus faciendo. In quo casu, querens faciat

he says) and is accustomed to have, as reasonably, &c. A writ likewise for having reasonable estover directed to the viscount, that he shall do justice as above. A writ likewise concerning a convention directed to the viscount, that he judicially enforce it as above. But the office of the viscount in this part is that in the presence of the parties he convene the hundred or wapentake. And in the first place let him see in whose ground or tenement that new work has been made, and if it be found to have been made on the ground of the person, concerning whom complaint is made, and to the nuisance of the freehold of the complainant, if this be established by a jury, let the viscount cause to be removed upon the view of recognisors that which is a nuisance at the cost of the offender, and let him cause it to be done in the manner, in which it is accustomed and ought to be done.

pasture, and a fishery, and the office of the viscount.

The king to the viscount greeting. Such a person has complained to us that so-and-so has unjustly, &c. raised a foss or some other thing (as above in the first paragraph well in order) in such a vill to the nuisance of his freehold in the same or in another vill since our last return, &c. And accordingly we enjoin you, that if the said person has found sureties, &c., then cause twelve free and loyal men from that neighbourhood to view that foss or the other things above named, and that tenement and their names to be inserted in the writ, and summon them by good summoners, that they present themselves before our justiciaries at the next assise and prepared to make a recognition thereon. And place under bail and safe sureties so-and-so aforesaid or his bailiff, &c., as above concerning a novel disseysine from a freehold.

5. A writ, if the king wills that nuisances of this kind be terminated before certain of his justiciaries.

Concerning the office of the viscount and the other matters let it be done as above in an assise of novel disseysine, except as regards the making a view by the jurors. In which case let the complainant make the view

6. Of making a view.

visum juratoribus de eo quod nocet, qualecunq; sit illud, vel quantum vel p quas metas, ut certa res in judicium deducaĩ, & ut scire poterit utrū plus posuerit in visu suo vel minùs quàm noceat, vel etiam nihil, ut inde certificari possunt justiciarii, cùm inde fuerint
f. 234. requisiti. Item utrum nocumentum justum sit vel injuriosum, magnum vel minimum, vel omninò nullum licet damnosum, ut per hoc scire possint utrum querela pertineat ad querentem vel non. Item videre oportet tenementum, cui injuriosè nocitum est, quia cùm[1] querens tenementum non habeat cui nocere possit, non valebit querela, vel ille de quo quæritur tenementum habeat quod noceat. In adventu verò justiciariorum faciendæ sunt plures interrogationes, ut sciri possit utrum ad querentem pertineat actio vel non, quo casu, cùm intentionem fundaverit querens, excipere poterit ille de quo queritur contra intentionem querentis multis modis, secundùm quod respondetur supra in assisa novæ disseysinæ.

7. De responsione et exceptionibus illius, de quo queritur, secundum articulos brevis. Dig. VIII., t. v. § 14.

Continetur enim in brevi. Questus est nobis talis, quòd talis: & eadem fiat responsio ut fit supra de libero tenemento, ut si dicat quòd fossatum non levavit vel quid aliud, sed aliàs non procedet assisa, maximè quoad pœnam & per hoc breve, quia hæredes & succedentes non tenentur ad pœnam ex delicto aliorum, licet teneantur ad restitutionem status, q̃ res ad statum pristinum deducatur etiam sine pœna ut supra, & non quia injuriam fecerunt, sed quia tenent rem quæ nocet, ad similitudinem ejus quod dicitur de

[1] "si," MS. Rawl. C. 160.

for the jurors of that which is a nuisance, whatever it may be, or how much or by what metes, so that a certain thing may be brought under judgment, and that it may be known whether he has put in his view more or less than that which is a nuisance, or even nothing, so that the justiciaries may certify thereon when they may be called upon. Likewise whether the nuisance be a just or a tortious nuisance, a great or a small nuisance, or none at all, although damaging, so that it may be thereby known whether the complaint appertains to the complainant or not. Likewise they must view the tenement to which the tortious nuisance has been caused, because when the complainant has no tenement to which a nuisance can be caused, his complaint will not be valid, or he concerning whom the complaint is made has [no] tenement which can cause a nuisance. But on the arrival of the justiciaries many interrogatories have to be administered, that it may be known whether the complainant is entitled to bring an action or not, in which case, when the complainant has founded his statement, he concerning whom complaint is made may except against the statement of the complainant in many ways, according to the answers above explained in an assise of novel disseysine. f. 234.

7. Concerning the answer and the exceptions of him, concerning whom complaint is made, according to the articles of the writ.

For it is contained in the writ. Such a person has complained to us that so-and-so: and let the same answer be given as was above given concerning a freehold, as if it be said that he has not raised a foss or any thing else, but otherwise the assise shall not proceed, especially as regards the penalty and by this writ, because heirs and successors are not liable to a penalty for an offence of others, although they are liable to make restitution of the state of things, that a thing be replaced in its former state even without a penalty as above, and not because they have done the tort, but because they hold the thing which is a nuisance, after the likeness of that which is said of a beam placed on the wall

tigno injuncto, q quis teneatur actioni de tigno injuncto, non solùm ille qui tignum injunxit, sed ille qui tignum habet injunctū. Et simili modo videtur de eo dicendum qui fossatum, vel stagnum, vel alia quæq; prostraverit vel levaverit, cùm illa habeat prostrata vel levata. Et illud idem erit dicendum (ut videtur) si tempore nocumenti facti non habuit querens tenementum cui noceri potuit, & ideo quia non fuit ei injuriatum, & de injuria alteri illata nemo debet acquirere sibi, vel potest actionem vel querelam habere. Item continetur (injustè & sine judicio), & tunc fiat eodem modo, quo supra de libero tenemento. Item continetur (levavit vel prostravit vel exaltavit), quo casu responderi poterit quòd ipse non levavit sed alius, sed tamen quod alius levavit dirutum esset vel corruptum vel prostratum, etiam sine judicio ipse illud refecit & reparavit. Item ad hoc quod dicitur, ad nocumentum, responderi poterit, quòd nullum omninò est ibi nocumentum, vel si nocumentum ibi fuerit, illud non est injuriosum, nec querens jus habet prohibendi ne fiat, sicut videri poterit de molendino levato in fundo alieno, ubi vicinus prohibere non potest ne fiat, licet damnum sentiat, quia damnum illud non est injuriosum licet damnosum, & sic dici poterit de aliis nocumentis, quæ damnosa sunt licet non injuriosa. Item dicitur (ad nocumentum liberi tenementi talis), unde oportet, quòd ille qui queritur liberum habeat tenementum, quia nemo potest servitutem acquirere alicujus prædii vel fundi, nisi qui habeat prædium & liberum tenementum, nec quisquam debere servitutem, nisi qui habet prædium & liberum tenementum.

of another, that a person is liable to an action for so placing a beam, not merely the person who has so placed the beam, but he who has the beam which has been so placed. And in a similar manner it seems, that it may be said of him who has thrown down or raised up a foss or a pond or other things, when he has those things which have been thrown down or raised up. And the same will have to be said (as it seems) if at the time of the nuisance being worked the complainant had not a tenement to which the nuisance could be done, and accordingly because no tort was worked against him, and concerning a tort done to another no one ought to acquire any thing for himself, nor can he have an action or a complaint. Likewise it is contained in the writ, "unjustly and without a judgment," and then let it be done in the same way as concerning a freehold. Likewise it is contained in the writ "he has raised or heightened " or thrown down," in which case it may be answered that he himself has not raised it, but another person has done so, but nevertheless what another has raised has been destroyed or decayed or thrown down, also without a judgment he has restored and repaired it. Likewise to this, which is said "so as to be a nuisance," it may be answered, that there is no nuisance at all there, or if there be a nuisance, it is not tortious, nor has the complainant the right to prohibit its being done, as may be seen in the case of a mill raised on another person's ground, where a neighbour cannot prohibit it being done, although he may feel the damage, because that damage is not tortious although damaging, and so it may be said of other nuisances, which are damaging but are not tortious. Likewise it may be said "to the " nuisance of a certain freehold," whence it is incumbent that he who complains should possess a freehold, for no one can acquire a servitude in any person's field or ground, unless he has a field and freehold, nor can any one be liable to a servitude, unless he has a field and a freehold.

8. Qualiter amoveri debet nocumentum.

Si autem nihil sit quod dici poterit contra assisam, procedat assisa, & si faciat pro querente, amoveatur id quod nocet & redigatur in pristinum statum ad custum ejus qui deliquit, & fiat per omnia sicut esse solet & debet, sive fieri debeat prostratio sive demollitio, refectio
f. 234 b. sive reparatio, aperitio sive amensuratio. Et unde si per judicium aliqua istorum fieri debeant, ad veterem formam reformantur, secundùm altitudinem & profunditatē, latitudinem, longitudinē & strictitudinem. Restitui enim debet primus status & refici. Reficit enim qui reparat & qui aperit & qui purgat, quia purgatio refectionis portio est. Sed non potest quis sub specie refectionis deterius aliquid facere, nec altius nec latius nec humilius nec longius aliquid facere.

9. De aqua diversa.

Itē nō potest quis aquæ ductum ita purgare, ꝑ q aqua aliter fluat quàm fluere solet. Si quis convictus fuerit per assisam q aquam diverterit vel aliquid fecerit, vel immerserit per quod aqua pressior vel altior vel rarior fluat vel rapidior, vel per quod in aliquo minuatur, vel per quod alveum fluminis mutet cum incommodo vicini. Item non solum tenetur qui aquam divertit, sed ille qui denegat q aliter aqua fluat, cùm jus non habuerit. Item tenetur quis qui dolo fecerit, quo magis aqua aliter fluat quàm solet, vel minùs solito. Ut si fossum[1] in suo fecerit, vel ita aquæ ductum refecerit vel purgaverit, q modum excedat, & per hoc aquam vicino auferat in parte vel in toto. Et in quibus casibus, si in hoc præsumptum fuerit, totum ad pristinum statum per assisam reformabitur. Sed si quis, cùm sibi per assisam perquirere deberet,

[1] "fossam," MS. Rawl. C. 160.

But if there be nothing which can be said against the assise, let the assise proceed; and if it is in favour of the complainant, let the nuisance be removed and [the ground] restored to its primitive state at the cost of the offender, and let it be done in every respect as it ought and is accustomed to be done in the way of throwing down or demolishing, re-making or repairing, opening or admeasuring. And hence if by the judgment any of those things ought to be done, let them be refashioned into the old form, according to height and depth, breadth, length, and straightness. For the primitive state ought to be restored. For he re-makes a thing who repairs it and who opens it and who cleanses it, because cleansing is a portion of re-making. But a person may not under pretence of re-making a thing make it worse, nor higher, nor wider, nor lower, nor longer.

8. How a nuisance ought to be removed.

f. 234 b.

Likewise a person may not so cleanse a water-course that the water shall flow through it otherwise than it is accustomed to flow. If a person is convicted by an assise that he has diverted the water or has done anything or immersed anything whereby the water flows in a lower or a higher, or a thinner, or a more rapid stream than before, or whereby it is diminished in any way, or whereby it changes the bed of the stream with inconvenience to a neighbour. Likewise not only is he liable who diverts the water, but he who denies that the water shall flow otherwise, when he has no right. Likewise he is liable, who by a trick has effected that the water flows in a different manner than it is accustomed, or less than customary. As if he shall have made a foss in his own ground, or has so repaired or cleansed the water-course, that it exceeds moderation, and thereby he takes the water away from his neighbour either in part or in whole. And in which cases, if the encroachment be established, the whole shall be restored to its pristine state by an assise. But if anybody, when he ought to claim this by an assise, or when he has made a claim,

9. Concerning diverse water.

vel cùm perquisiverit, propria autoritate (spreto judicio) seysinam suam usurpaverit quod per judicem reposcere debēret, quod sic sibi præsumpsit per judicem restituet, vix imposterum audiendus super ipsa proprietate, ut coram ipso rege apud Clarindō anno regni sui 32. in cōm South: de quadam aqua trestornata in insula de Wych inter Simonem de Vendenge querentem & Jordanum de insula. Ea quæ nunc dicta sunt sufficiant exempli causa, ut sciatur qualiter tollenda sunt nocumenta, & qualiter per assisam reformanda sint omnia & in pristinum statum reducenda.

10. De stagno levato.

Item de stagno & gurgite levato vel prostrato ad nocumentum injuriosum, videndum erit utrum omninò levatum sit in tenemēto ipsius querentis, cùm habeat tenementum ex utraq; parte ripæ. In quo casu, potius erit ibi disseysina de libero tenemento, quàm assisa de nocumento. Si autem levatum vel prostratum omninò in tenemento illius de quo queritur, ibi erit potius assisa de nocumento quàm de libero tenemento, cùm hoc totum sit in alieno. Si autem pars quædam in ꝑprio & pars quædam in alieno, ut si aqua dividatur per medium, tunc pro ea parte, quæ fuerit in proprio, locum habebit assisa novæ disseysinæ de libero tenemento: & pro ea parte, quæ fuerit in alieno, locum habebit assisa de nocumento, & sic duæ erunt assisæ de uno facto. Et cùm onerosum sit utraq; prosequi, videndum erit quæ illarum deberet præferri ad injuriam ex toto tollēdam, ne pro una parte procedat & pro alia infecta remaneat, & si velitis corrigere per assisam novæ disseysinæ totum quod actum est de libero tenemento, hoc esse non poterit, quia assisa illa

Britton, ii. ch. xxxi. § 2.

has of his own authority (despising a judgment) usurped seysine of that, which he ought to demand back through the judge, he shall restore through the judge what he has so presumed for himself, and shall in future be with difficulty heard upon the question of the property, as before the king at Clarendon in the thirty-second year of his reign in the county of Southampton, concerning certain water diverted in the island of Wight between Simon de Vendenge the complainant and Jordan of the island. The things above said may be sufficient for example's sake, that it may be known what nuisances are to be taken away, and in what way all are to be reformed by an assise and brought back to the pristine state.

10. Of heightening a pond.

Likewise concerning the heightening or lowering of a pond or a weir to be a tortious nuisance, it is to be seen whether it has been heightened altogether in the tenement of the complainant, when he has the tenement on each side of the river. In which case there will rather be a disseysine from a freehold, than an assise for a nuisance. But if it has been raised or lowered altogether in the tenement of him concerning whom the complaint is made, there will rather be an assise for the nuisance than for the freehold, since it is altogether in another person's ground. But if a part be in one's own ground and a part in another's ground, as if the water be divided by the middle, then in respect of that part which is on one's own ground an assise of novel disseysine from the freehold shall have place, and in respect of that part which is on another's ground, an assise concerning the nuisance shall have place, and so there shall be two assises concerning the same act. And since it would be onerous to prosecute both, it will have to be seen which of them ought to be preferred to remove the tort altogether, lest one should proceed for one part and the other remain unremedied; and if you would wish to correct by an assise of novel disseysine all which has been done concerning the freehold, this cannot be effected,

non comprehendit assisam de nocumento, quod factum est in alieno. Melius est igitur q̃ per assisam de nocumēto, per quam poterit utraq̃ terminari, quia assisa de nocumento extendit se ad fundum alienum in eo quod nociva est & injuriosa, licet se non extendat quantum ad liberum tenementum, & sic
f. 235. assisa de nocumento terminat utranque, s. q̃ nocumentum tollatur & q̃ res ad pristinum statum reducatur. Itē ex uno facto plures possunt esse disseysinæ de libero tenemento, & plura nocumenta injuriosa eodem modo. Plures disseysinæ de libero tenemento, ut si quis fossatum levaverit in fundo alieno invito domino, per hoc facit disseysinam de libero tenemento ei, qui dominus est, & obstructionem viæ & diversionem aquæ, quæ sunt quasi nocumenta injusta (secundùm quosdam), licet in alieno. Sed omnes terminari possunt per unicam assisam de libero tenemento, cùm surgant ex uno facto, per facti emendationem. Si autem una vel ambæ erigantur quæ nocent, adhuc poterit injuria remanere pro parte. Et ideò melius est quòd una assumatur, quæ totum terminet negotium. Et eodem modo potest quis facere in suo ex uno facto, per quod plura nocumenta imminere possunt vicino, ut si viam obstruat fossato, per quam ingredi solet ad pasturam, facit disseysinam de communia & similiter nocumentum in via & divertit aquam, & sic facit unam disseysinam de communia in proprio & duo nocumenta ex uno facto, & unde fiat ut supra. Item potest unus ex uno facto pluribus obligari & teneri ex disseysina & nocumēto, ut si quis alterius tenementum incluserit vel commune, & in quo unus habet liberum tenementum & alius communiam pasturæ, unus vel plures, tertius &c. & iter & actum

because that assise does not comprehend an assise for a nuisance, which is done in another person's ground. It is better therefore to proceed by an assise for a nuisance, whereby both may be determined, because an assise for a nuisance extends itself to another's ground in as far as it is noxious and injurious, although it does not extend as far as regards the freehold, and so an assise for a nuisance determines both, to wit, that the nuisance be f. 235. removed, and that the thing be brought back to its former state. Likewise out of a single act there may be several disseysines from the freehold, and several nuisances in the same manner. Several disseysines from the freehold, as if a person has raised a foss in the ground of another against the will of the lord, he thereby causes to him, who is the lord, a disseysine from his freehold and an obstruction of his road and a diversion of the water, which are as it were tortious nuisances (according to some) although they are in another's ground. But they may all be determined by a single assise concerning the freehold, since they arise from a single fact by an amendment of the act. But if one or both are erected, which are nuisances, the injury may still remain partially. And therefore it is better that one be assumed that will terminate the whole affair. And in the same way a person may do a thing on his own ground by a single act, whereby many nuisances may threaten his neighbour, as if he should obstruct by a foss the road, by which he had usually access to a pasture, he causes a disseysine of common, and in like manner a nuisance in the road, and he diverts the water, and so causes one disseysine in his own ground, and two nuisances from a single act, and hence let it be done as above. Likewise a person may from a single act be liable and bound to several persons in respect of a disseysine and a nuisance, as if a person shall have enclosed the tenement of another or a common, and in which one has a freehold and another a common of pasture, one or more, a third, &c., and a foot-

per medium, quartus ad aquationem in aliqua parte, & sic in infinitum: plures hic erunt disseysinæ & plura nocumenta, unde priùs recurrendum erit ad remedium quod totum terminat (si dominus tenementi voluerit), alioquin quilibet agat pro se & per se. Item si quis divertit cursum aquæ, refert in quo cõm, vel in quo loco factum fuerit id quod nocet, sicut in gurgite, stagno, & piscaria. Item refert utrum aqua, in qua id factum est quod nocet, propria sit ejus de quo queritur vel communis vel in parte propria, scilicet usq; ad filum aquæ & partim aliena. Si autem omninò propria ejus qui divertit & in eadem villa, & tenementum cui nocetur in eadem villa, tunc stabit breve: cùm dicatur, quòd talis divertit cursum aquæ in tali villa ad nocumentum liberi tenementi talis in eadem villa. Si autem aqua sit communis plurium & propria, non dico tantum ad usum piscandi, tunc refert quid.

Cap. XLVI.

1. Si mercatum aliquod levatum sit ad nocumentum vicini mercati.

Britton, i. ch. xxxi. § 8.

Fleta, 272. § 13.

Poterit inter alia nocumenta concedi libertas ad nocumentum libertatis priùs concessæ, ut si cui concedatur libertas habendi mercatum aliquo loco certo, ita quòd non sit ad nocumentum alicujus mercati vicini: & unde inprimis videndum quale mercatum dici debeat mercatum vicinum, & quale non vicinum sive remotum. Item quale sit nocumentum, ad hoc quod sufficiat ad tollendum id quod nocet, s. utrum damnosum sit & injuriosum, vel tantum damnosum & non injuriosum, quia remotum: vel damnosum & injuriosum, quia vici-

way and a bridle-way through the midst, a fourth to a watering place in some part, and so to an infinite number; here there will be several disseysines and several nuisances, whence recourse will first have to be had to a remedy which will determine all (if the lord of the tenement is willing), otherwise each must proceed for himself and by himself. Likewise if any one has diverted a water-course, it is of importance in what county, or in what vill, or in what place the nuisance has been effected, as in a weir, a pond, or a fishery. Likewise it is of importance whether the water, in which the nuisance is caused, is the property of him concerning whom it is complained, or is common, or partly his own, that is to the midstream, and partly another's. But if it be altogether the property of him who has diverted it, and is in the same vill, and the tenement to which the nuisance is caused is in the same vill, then the writ shall stand, when it is said that such a person has diverted the water-course in such a vill to the nuisance of the freehold of so-and-so in the same vill. But if the water be common to several persons and private property, I do not say only for the use of the fishery, then it matters somewhat.

Chapter XLVI.

1. If a market has been raised, so as to be a nuisance to a neighbouring market.

Amongst other nuisances a franchise may be granted so as to be a nuisance to a franchise previously granted, as if there be granted to any one a franchise to have a market in a certain place on condition that it be not a nuisance to another neighbouring market, and hence it is necessary to see what kind of a market is to be called a neighbouring market, and what not neighbouring or remote. Likewise what kind of nuisance it is, that it should be sufficient to remove that which causes the nuisance, and whether it be hurtful and tortious, or only hurtful and not tortious, because it is remote, or hurtful and tortious, because it is neighbouring, or if neighbouring,

num : vel si vicinum, non injuriosum, quia non ad damnum sed ad commodum. Vicinum autem dici poterit mercatum & nocumentum injuriosum, quia damnosum
f. 253 b. quandoq̄, ut si novum mercatum levatum sit infra sex leucas & dimidium & tertiam partem dimidiæ. Et est ratio, secundùm dicta seniorum, quia omnis rationabilis dieta constat ex xx. milliaribus. Dividatur dieta in tres partes, prima pars matutina detur euntibus versus mercatum, secunda verò detur ad emendū & vendendū, quæ quidem sufficere debet omnibus nisi sint fortè mercatores stellati, qui merces deposuerint & exposuerint venales, quibus necessaria erit prolixior mora in mercato. Tertia verò pars relinquitur redeuntibus de mercato ad ꝑpria, & quæ quidē omnia necesse erit facere de die & non de nocte, propter insidias & incursum latronum, quòd omnia sint in tuto. Cùm igitur infra talem terminum impetretur mercatum, erit prosternendum : quia nocumentum damnosum est & injuriosum, quia sic vicinum. Si autem ultra talem terminum, licet damnosum sit, non erit tamen injuriosum, quia remotū & non vicinum. Item poterit mercatum esse vicinum infrà prædictos terminos & non injuriosum, quia non damnosum sed potiùs ad commodum, ut si illud de novo levatum sit secundo die vel tertio ad plus post diem alterius mercati. Si autem ante, secundo die vel tertio, erit injuriosum, quia damnosum. Et unde si mercatum non sit vicinum, non erit demolliendum, quia non injuriosum, licet damnosum. Si autem vicinum & infra terminum prædictum, si fuerit ad commodum, erit sustinēdum propter verba, nisi sit ad nocumentum. Item si levatio unius sit ad nocumentum alterius, tunc videndum q̄ ipsorum primò levatum, & ideò licet ad nocumentum, non

not tortious, because it does not tend to damage but to advantage. But a market may be called neighbouring and the nuisance tortious, because it is hurtful sometimes, as if a new market has been raised within six miles and a f. 235 b.
half and the third part of a half. And the reason is, according to the sayings of the elders, because every reasonable day's journey consists of twenty miles. The day's journey is divided into three parts, the first part, that of the morning, is to be given to those who are going to the market, the second is to be given to buying and selling, which ought to be sufficient to all, unless they be merchants who have stalls, who have deposited their goods and exposed them for sale, to whom a longer delay in the market may be necessary. But the third part is left for those returning from the market to their own homes, and for doing all those things which must be done by day and not by night, on account of the snares and attacks of robbers, that all things may be in safety. When therefore a market has been obtained within such a limit, it will have to be levelled, since it is a hurtful and tortious nuisance, because it is so near. But if it be beyond that limit, although it may be hurtful, it will not be tortious, because it is remote and not neighbouring. Likewise a market may be neighbouring within those limits aforesaid, and not tortious, since it is not hurtful but rather advantageous, as if it be held anew on the second or third day at the most after the day of the other market. But if it be held on the second or third day before it, it will be tortious, because hurtful. And hence if a market be not neighbouring, it will not have to be demolished, because it will not be tortious, although it be hurtful. But if it be neighbouring and within the aforesaid limit, if it should be advantageous, it will have to be sustained on account of the words "unless it be a "nuisance." Likewise if the holding of one be a nuisance to the other, then it must be seen which was the first held, and accordingly although a nuisance, it is not tor-

tamen injuriosum, q̃a primum. Item quamvis damnosum, non erit injuriosum, si de licentia querentis levatum sit.

Cap. XLVII.

1. Breve de ingressu post disseysinam factam de servitutibus et eorum pertinentiis, si una partium moriatur, vel pars utraque.

In assisa novæ disseysinæ de communia pasturæ vel alia communia, quæ servitutes dici possunt & jura, si contingat q̃ una partium moriatur vel ambæ, nihilominùs remanebit injuria, licet cadat assisa in eo, q̃ pœnalis est, ut supra dicitur de libero teñto, & sicut assisa illa pœnalis est & personalis & rei restitutoria, sic est ista restitutoria status q̃ntū ad hæredes, cujuscunq̃ ætatis fuerit,[1] & alios possidẽtes, ut res ad statū debitū reducaẗ p̃ breve de ingressu, sicut ibi & per tale breve. Rex vicecom̃ salutem. Præcipe A. q̃ justè &c. reddat B. communiam pasturæ ad tot averia, vel quantum pertinet ad tantum tenementum in eadem villa secundùm modum feoffamenti. Vel sic: communiam pasturæ per totam terram suam ad tot averia vel omnimoda, in boscis, & vastis ubiq̃ extra blada, prata, et rationabilia defensa, vel sic: communiam bosci, brueræ vel turbariæ ad rationabile estoverium, vel communiam pessonæ. Itẽ communiam fodiendi, hauriendi, venandi, piscandi & hujusmodi secundùm omnia genera communiarum cum pertinentiis in tali villa, quæ pertinet ad liberum tenementum suum in eadem villa vel in alia, de qua talis pater ipsius talis, qui tenet, vel alius antecessor (cujus hæres ipse est) injustè &c. disseysivit prædictū talẽ, ita q̃ assisa novæ disseysinæ inde arramata fuit &c. & sic p̃ omnia ut supra de libero tenemento, cum clausula vel sine, et

[1] "Cujuscunque ætatis fuerit," omitted in MSS. Rawl. C. 159 and 160.

tious, because it was held the first. Likewise although hurtful, it will not be tortious if it has been held with the license of the complainant.

Chapter XLVII.

1. A writ of entry after a disseysine from servitudes and their appurtenances, if one of the parties dies, or both parties.

In an assise of novel disseysine from common of pasture or other kind of common, which may be called servitudes or rights, if it happens that one of the parties dies, or both, the tort will still remain, although the assise fails in regard to it being penal, as has been said above concerning a freehold, and as that assise is penal and personal and for the restitution of the thing, so this is for the restitution of the *status* as regards the heirs, of whatever age they may be, and other possessors, so that the thing may be brought back to its due state by a writ of entry, as in that case, and by such a writ as this. The king to the viscount greeting. Enjoin A. that he justly &c. restore to B. common of pasture for so many cattle, or as much as appertains to a tenement of such a size in the same vill according to the mode of the feoffment, or thus: common of pasture over the whole of his land for so many cattle or of all sorts, in woods and wastes everywhere, excluding corn, meadows, and reasonable enclosures, or thus: common of wood, heath, or turbary, for reasonable estovers, or common of beech-mast. Likewise common of digging, drawing water, hunting, fishing, and such like, according to all kinds of commons with their appurtenances in such a vill, which appertains to his free tenement in the same vill or in another: concerning which so-and-so, the father of so-and-so himself who holds it, or another ancestor (whose heir he is), unjustly &c. disseysed such a person aforesaid, so that an assise of novel disseysine was commenced thereupon, and so throughout as above concerning a free tenement, with a clause and without it, and

secundùm q disseysitor vel disseysitus mortui fuerint
f. 236. vel eorum alter, q̃a hîc et ibi eadē ratio: & si visus petatur, faciat petens visum tenementi (sicut faceret querens si viveret) juratoribus, & non remaneat, si dicatur fortè q jura & servitutes videri non possunt, cùm sint incorporalia & per hoc invisibilia & intangibilia, quia possunt corpora videri, s. tenementa in quibus constituunt talia jura, & etiam tenementa ad quæ dicuntur pertinere, ut sciri poterit in quibus locis & infrà quas metas contineantur, sicut fit tota die de communia pasturæ per breve de recto & per breve de quo jure. Simili modo (ut videtur) possit peti visus in jure advocationis, quamvis jus videri non possit, sufficit (ut videtur) q videatur corpus cui illud jus inest. Et revera unum est videre jus & aliud ecclesiam, sicut fit in assisa ultimæ præsentationis. Quod autem dicitur suprà de brevi de ingressu in assisis & servitutibus, illud idem dici posset de nocumentis: ut si aliquis in suo faceret aliquid injuriosè q fundo vicini noceret, & super hoc arramata esset assisa, & ante captionem assisæ una pars moreretur vel ambæ, q propter hoc non remaneret injuria quoad reformationem status, quamvis non quoad pœnam, & hic eadem ratio quæ suprâ, & ideò idem jus per tale breve de fossato & muro & aliis levatis injustè, q prosternentur, et de prostratis injustè, q releventur et reparentur, et de exaltatis injustè, q amensurentur, et de viis obstructis injustè, q aperiantur ad usum debitum, et de aquis trestornatis, q retornentur et in statum debi-

according as the disseysor or the party disseysed are dead, or one of them, because here and there it is the same reason: and if a view be claimed, let the party f. 236. claiming a view of the tenement (as the claimant would do if he were alive) make it for the jurors, and let him not remain, if it be said by chance that rights and servitudes cannot be viewed, since they are incorporeal and thereby invisible and intangible, because bodies may be seen, that is, tenements in which such rights are appointed, and also tenements to which they are said to appertain, that it may be known in what places and within what metes they are contained, as is done every day concerning common of pasture by a writ of right and a writ of *Quo jure*. In a similar manner (as it seems) a view may be claimed in a right of advowson, although the advowson cannot be viewed, it is sufficient (as it appears) that the body be viewed, in which the right exists. And indeed it is one thing to view the right and another to view the church, as is done in an assise of last presentation. But what is said above concerning a writ of entry in assises and servitudes, the very same thing may be said concerning nuisances; as if any one should do on his ground any thing tortiously, which would hurt the ground of his neighbour, and upon this an assise were instituted, and before the holding of the assise one party should die, or both, that on that account the tort would not abate as regards the reformation of the state of things, although not so as regards the penalty, and here the same reason [prevails] as above, and accordingly the same right by such a writ concerning a foss and a wall and other things tortiously raised, that they shall be thrown down, and concerning things thrown down tortiously, that they may be raised and repaired, and concerning things tortiously heightened, that they be admeasured, and concerning roads obstructed tortiously, that they be opened for their due use, and concerning waters diverted, that they be re-

tum reformentur. Forma brevis talis esse poterit. Rex vic. salutem. Præcipe A. q justè &c. relevari faciat et reparari quoddam fossatum in tali villa, q B. pater vel alius antecessor ipsius talis (cujus hæres ipse A. est) injustè et sine judicio prostravit in eadem villa ad nocumentum liberi tenementi ipsius C. in alia villa tali vel in eadem. Et unde assisa novæ disseysinæ inde arramata fuit et visus terræ &c. et remansit assisa capienda &c. ut supra, vel sine clausula illa sic. Et unde talis obiit, antequam sibi perquirere potuit per assisam, ut idem C. dicit, et nisi fecerit &c. Si tamen talis actio extendi non deberet ad hæredes in eo q pœnalis est, et valde onerosum esset alicui hæredi et sumptuosum hujusmodi nocumenta ad statum pristinum reducere. Et ideò fiat quandoq breve sub hujusmodi verbis. Præcipe tali &c. q permittat talem relevare sive reparare &c. Eodem modo fiat, si quis fossatum levaverit vel murum injuriosè, q prosternatur. Et hoc sufficit exempli causa. Possit enim formari breve de hujusmodi ad similitudinem assisæ mortis antecessoris, quia continuatur seysina ab antecessore usq ad hæredes, ut si nocumentum factum fuerit, et ille cui injuriatum sit moriatur in eodem die vel in crastino vel in tertio die, quia talis retinet possessionem civilem et statum, quamvis naturalem amiserit. Et poterit talis hæres ex tali seysina recēter ꝑsternere vel levare, sicut posset antecessor si viveret, si hoc liceat heredi et tūc sic: Prꝯcipe A. q justè &c. relevare faciat vel reparare quoddā fossatū in tali villa, q quidē B. pater ipsi^{9} A. (cuj^{9} hꝯres ipse est) injustè ꝑstravit in eadē villa ad nocumētū &c. vel cōpetere

turned and reformed to their due state. The form of the writ may be of this kind. The king to the viscount greeting. Enjoin A. that he rightfully &c. cause a certain foss to be raised again and repaired in such a vill, which B. his father or other ancestor of so-and-so (whose heir A. himself is) tortiously and without a judgment threw down in the same vill to the nuisance of the freehold of C. himself in another such vill or in the same. And whereof an assise was thereupon instituted and a view had of the land &c., and the assise remained to be held &c. as above, or without that clause thus: And whereupon so-and-so died before he could obtain for himself by an assise, as the said C. says, and unless he shall do so, &c. If, however, such an action cannot be extended to the heirs inasmuch as it is penal, and it would be very onerous and costly to an heir to restore this kind of nuisances to their pristine state. And accordingly let there be sometimes a writ under these words: Enjoin so-and-so that he permit such a person to raise again and to repair, &c. In the same manner let it be done, if any one has raised a foss or a wall tortiously, that it be thrown down. And this is sufficient for example's sake. For a writ of this kind may be drawn up after the likeness of an assise of the death of an ancestor, because the seysine is continued from the ancestor to the heir, so that if a nuisance has been caused, and he against whom the tort is worked should die on the same day or on the morrow, or on the third day, because such a person retains the civil possession and *status*, although he has lost the natural. And such an heir from such a seysine may recently throw down or raise up, as his ancestor might, if he were alive, if this be allowed to the heir; and then thus: Enjoin A. that rightfully &c. he cause to be raised up or repaired in such a vill a certain foss, which a certain B., the father of A. (whose heir he is), tortiously threw down in the same vill to the nuisance &c.; or the heir is entitled to

poterit hẽredi assisa novę disseysinę de nocumẽto, sicut cõpeteret antecessori dum vixit, ꝑpter talem continuationem: ꝙa ꝑ civilem possessionem quā antecessor retinuit, injuriatur hæredi sicut antecessori, ꝙa antecessor incontinenti possit reficere vel prosternere, nisi impediretur quasi morte præventus. Si autem negligens fuit antecessor in impetrando longè ante mortem suam, ꝙ ita sibi per negligentiam non impetravit cùm posset, hæredi non dabitur actio per breve de ingressu propter negligentiā sui antecessoris, quia non videtur ꝙ hæredi noceri possit, quod antecessori non nocuit.

Cap. XLVIII.

1. Breve, si infra summonitionem itineris justiciariorum contingat disseysinam fieri qualemcunque.

Contingit quandoq; disseysinam fieri infrà sum̄onitionem itineris justiciariorum, ubi non esset necesse recurrere ad curiam pro habendo breve, sed fiat per justiciarios in hac forma. Titius de tali loco & socii sui justiciarii itinerantes in tali cõm̃ vic. tali sal. Questus est nobis talis, quòd talis injustè &c. Et sic in omnibus ut supra, præterquam de termino & tunc dicatur, s. infrà summonitionem itineris nostri. Et ideò tibi præcipimus &c. ut supra, & statim capiatur assisa cùm juratores præsentes sint & visum fecerint. Sed videndum erit utrum disseysina facta fuerit in ipso itinere & infrà summonitionem itineris vel ante, in parte vel in toto, ut breve conveniat cum querela & per omnia procedendum erit & respondendum ut supra.

an assise of novel disseysine concerning the nuisance, as his ancestor would have been, whilst he lived, on account of such continuance, because through the civil possession, which his ancestor retained, a tort is worked against the heir as against the ancestor, because the ancestor might have immediately repaired it or thrown it down, unless he had been impeded as it were prevented by death. But if the ancestor has been negligent in suing out a writ long before his death, because through negligence he has thus not sued out for himself, when he might, an action by a writ of entry shall not be allowed to the heir on account of the negligence of the ancestor, because it does not seem that that which was not hurtful to the ancestor can be hurtful to his heir.

Chapter XLVIII.

1. A writ, if within the summons of the iter of the justiciaries, it happens that a disseysine of any kind takes place.

It happens sometimes that a disseysine takes place within the summons of the iter of the justiciaries, when it would not be necessary to have recourse to the court to have a writ, but it may be done by the justiciaries in this form. Titius of such a place and his companion justiciaries itinerant in such a county to such a viscount greeting. So-and-so has complained to us, that such a person wrongfully &c., and so in all particulars as above except concerning the term, and then let it be said, to wit, within the summons of our iter. And accordingly we enjoin you &c. as above, and let an assise be held immediately, when the jurors shall be present and have made a view. But it is to be seen, whether the disseysine has been made in the iter itself, and within the summons of the iter or before, in part or in entirety, that the writ may agree with the complaint, and that throughout the proceedings, and the answer may be made as above.

Cap. XLIX.

1. Quod non debet fieri disseysina super disseysinam, nec assisa super assisam, nec jurata super juratam, nec convictio super convictionem. Statut. Merton. § 3. Cf. f. 227.

Si quis autem[1] disseysitus fuerit de tenemento suo vel aliquo quod ꝑtineat ad tenementum, & coram justiciariis itinerantibus seysinam suam recuperaverit ꝑ assisam quācunq; vel ꝑ recognitionem eorum qui disseysinam fecerint, & ipse disseysitus per vic. seysinam suam habuerit: si verò disseysitores postea post iter vel infrà, eum qui recuperavit iterum disseysiverint & inde convicti fuerint, statim capiantur, & in prisona dñi regis detineantur quousq; per dominum regem vel alio modo deliberentur: & fiat breve vic. directum in quo contineatur narratio de disseysina facta super disseysinam, quod tale erit. Rex vic. salutem. Monstravit nobis talis, q cùm ipse in curia nostra &c. apud talem locum recuperasset seysinam suam versus talem de tanto terræ cum ꝑtinentiis in tali villa, ꝑ recognitionem assisæ novæ disseysinæ ibi indè inter eos captæ, ipse talis ꝑdictum talem de eadem terra iterum contra judicium in curia nostra factum injustè disseysivit. Et ideò tibi præcipimus, q assumptis tecum custodibus placitorum coronæ nostræ, & xii. tam militibus quàm aliis liberis & legalibus hominibus, tam de illis qui in prima assisa sive jurata fuerunt, quàm aliis, in ꝑpria ꝑsona tua accedas ad terrā illā, & ꝑ eorū sacramentum diligentem facias inde inquisitionem, & si ipsum talem iterū ꝑ prædictum talem injustè disseysitum inveneris, tunc ipsum capias, & in prisona nostra salvo custodias, donec aliud inde præceperimus, & inde tali seysinam suam rehabere facias. Teste &c. Talis quidē, qui ita cōvictus fuerit, dupliciter delinquit

[1] "Si quis autem" down to "deliberentur" forms part of the third paragraph of the Statute of Merton, 20 H. III.

Chapter XLIX.

1. That a disseysine should not be made upon a disseysine, nor an assise upon an assise, nor a jury upon a jury, nor a conviction upon a conviction.

But if a person has been disseysed from his tenement or from anything which appertains to his tenement, and in the presence of the justiciaries itinerant has recovered his seysine through any kind of assise or through an acknowledgment on the part of those who have caused the disseysine, and the party disseysed has obtained his seysine through the viscount; if indeed the disseysors subsequently after the iter, or during it, have again disseysed the party who has recovered, and thereupon have been convicted, let them be forthwith captured, and let them be detained in the prison of the lord the king, until they be set free by the lord the king, or in some other way, and let a writ issue directed to the viscount, in which shall be contained a statement of the disseysine made upon the disseysine, which shall be of this kind. The king to the viscount greeting. So-and-so has shown to us, that when he in our court &c. at such a place had recovered his seysine against such a person concerning so much land with its appurtenances in such a vill, by a recognition of an assise of novel disseysine there held between them, the said such person has wrongfully disseysed the aforesaid so-and-so from the same land a second time, contrary to the judgment passed in our court. And accordingly we enjoin you, that having taken with you the keepers of the pleas of our crown and twelve knights, as well as other free and loyal men, as well of those who were in the first assise or jury as others, you go in your own person to that land, and by their oath make diligent inquisition, and if you shall find so-and-so aforesaid a second time disseysed wrongfully by such person aforesaid, then capture the latter and keep him in safe custody in our prison, until we shall enjoin you further thereupon, and thereon cause such person aforesaid to regain his seysine. Witness, &c. So-and-so indeed, who has thus been convicted, offends

contra regem, quia facit disseysinam & roberiā contra pacem suam, & etiam ausu temerario irrita ea, quæ in curia domini regis ritè acta sunt: & propter duplex delictum meritò sustinere debet pœnam duplicatam. Et eodem modo fiat de illis, qui alios ejecerint de seysina qualitercunque, vel de quacunque re seysinam
f. 236 b. suam recuperaverint in curia domini regis p assisam, recognitionem, juratam, judicium, concordiam, vel alio quocūq; modo. Alia forma brevis de eodē. Rex vic. salutem. Monstravit nobis talis psona talis ecclesiæ, q cùm assisa sum̄onita esset coram justiciariis nostris ultimo itinerantibus in com̄ tuo, ad recognoscendū utrum tantū terræ cū pertinentiis in tali villa esset libera eleemosina pertinens ad ecclesiam ipsius talis de tali villa, an laicum feodum talis, & idem talis recuperasset seysinam de prædicta terra, eo quòd prædictus talis recognovit prædictam terram esse jus prædictæ ecclesiæ ipsius talis, vel per recognitionem ejusdem assisæ inde inter eos ibidem captam: Idem talis prædictum talem de eadem terra postea injustè disseysivit. Et ideò tibi præcipimus, q assumptis tecum &c. ut supra. Hoc breve fit secundùm qualitatem cujuslibet brevis p quod seysina recuperatur coram justiciariis, & variatur secundùm varietatem assisarum, & secundùm recordum ita, s. ut supra. Monstravit nobis talis q cùm in curia nostra &c. arramasset assisam novæ disseysinæ versus talem de quadam piscaria levata in tali loco, vel de quodam stagno levato vel exaltato, vel fossato levato, & hujusmodi ad nocumentum liberi tenemēti sui in tali villa, & recognitum esset p eandē assisam

doubly against the king, because he effects a disseysine and a robbery against the peace of the king, and likewise by his rash audacity renders vain those things, which have been duly transacted in the court of the lord the king: and on account of the double offence he ought deservedly to undergo a double punishment. And in the same manner let it be done with those, who have ejected others from any seysine whatever, or have recovered their seysine of anything in the court of the lord the king by an assise, a recognition, a jury, a judgment, a f. 236 b. concordat, or in any other way. Another form of a writ concerning the same. The king to the viscount greeting. So-and-so, parson of such a church, has shown to us that when an assise was summoned before our justiciaries when last itinerant in your county, to recognise whether so much land with its appurtenances in such a vill was free alms appertaining to the church of so-and-so in the said vill, or the lay fee of such a person, and so-and-so aforesaid recovered seysine of the aforesaid land, inasmuch as such person aforesaid acknowledged that the aforesaid land was the right of the aforesaid church of so-and-so, or by the recognition of the said assise there held betwen them: such person aforesaid has subsequently disseysed so-and-so again wrongfully from the same land; and accordingly we enjoin you that having taken with you, &c. as above. This writ is drawn up according to the quality of any writ whatever through which seysine is recovered before the justiciaries, and it is varied according to the variety of assises, and according to the record thus, to wit, as above. So-and-so has shown to us that when in our court he had instituted an assise of novel disseysine against such a person concerning a fishery set up in such a place, or concerning a certain pond raised or heightened, or a foss raised and such like, so as to be a nuisance to so-and-so's free tenement in such a vill, and it was recognised by the same assise that that fishery had been made or the

q̃ piscaria illa facta esset, vel stagnum levatum, & hm̃odi ad nocumentum ipsius talis, & præceptum esset tibi quòd piscariam illam demolliri faceres vel stagnum prosterni & hujusmodi &c., & fieri sicut esse solet & debet, & hoc ita factum esset p̃ præceptum eorundem justiciariorum nostrorum: ille idem talis postea, ausu temerario contra ea quæ in curia nostra acta fuerunt, piscariam illam iterum fecit in eodem loco quo priùs, vel stagnum fecit exaltari sicut priùs. Item cùm talis per judicium curiæ nostræ recuperasset tantam terram cum pertinentiis in tali villa ut jus suum, vel per finem factum vel alio quocunque modo, & in seysinam positus esset, idem talis contra ea quæ in curia nostra ritè acta sunt & judicata, ipsum inde injustè disseysivit. Et ideò tibi præcipimus quòd assumptis tecum &c. in p̃pria p̃sona tua accedas ad locum illum, & si ita esse inveneris tunc &c.

Cap. L.

1. Si contingat aliqua ratione assisam novæ disseysinæ capi extra comitatum, tunc breve de seysina habenda.

Si autem contingat aliquo tempore & casu q̃ assisa novæ disseysinæ capiat̃ extra com̃, vel ille, cujus assisa capta fuerit in com̃, querat̃ q̃ seysinā non habuit, tunc de seysina habenda in hm̃di assisa fiat tale br̃e. Rex vic. salutem. Scias q̃ A. in curia nostra coram justiciariis nostris &c. recuperaverit seysinā suam versus B. de libero ten̄to suo in tali villa, vel si terra fuerit specificata tūc dicat̃: de tanta terra cum p̃tinentiis in tali villa p̃ assisam novæ disseysinæ inde ibi inter eos ibidē captam. Et ideo tibi præcipimus, q̃ p̃ visum recognitorum ejusdem assisæ eidem A. de prædicto ten̄to vel terra sine dilatione plenariam seysinam habere facias. Teste &c. Si autē deforcians cognoverit

pond raised, and in this manner to be a nuisance to so-and-so aforesaid, and it was enjoined you that you should cause that fishery to be demolished or the pond to be levelled, and such like, &c., and to be done as is customary and ought to be done, and this was so done according to the precept of our justiciaries; yet such person aforesaid subsequently by rash audacity, contrary to what had been transacted in our court, made a second time that fishery in the same place as before, or caused that pond to be heightened as before. Likewise when so-and-so by a judgment of our court had recovered so much land with its appurtenances in such a vill as his right, or by making a fine or in some other way, and had been placed in seysine, such a person aforesaid, contrary to what had been done and adjudged solemnly in our court, wrongfully disseysed him therefrom. And accordingly we enjoin you that having assumed with yourself, &c., you go in person to that place, and if you find it so, then, &c.

Chapter L.

1. If it happen in any manner, that an assise of novel disseysine be held outside the county, then a writ for having seysine.

But if it happen at any time or in any case that an assise of novel disseysine is held outside the county, or he, whose assise has been held within a county, complains that he has not had seysine, then let such a writ as this issue, concerning the having seysine in an assise of the hundred. The king to the viscount greeting. Know thou that A. in our court, before our justiciaries &c., has recovered his seysine against B. concerning his freehold in such a vill; or if the land has been specified, then let it be said of so much land with its appurtenances in such a vill, by an assise of novel disseysine there held between them thereon. And accordingly we enjoin you that by the view of the recognisors of the same assise you cause the said A. to have plenary seysine of the said tenement or land without delay. Witness, &c. But if the disseysor has acknowledged the disseysine, then let

disseysinam, tunc in brevi inseratur recordum sic: Scias q cùm A. in cur̃ nostra &c. arramasset assisam novæ disseysinæ versus B. de teñto in tali villa, idem B. venit in eadē curia nostra corā eisdem justiciariis, & cognovit disseysinam. Et ideo tibi præcipimus &c.
f. 237. ut supra. Et addatur hæc clausula in fine cujuslibet brevis. Et etiam pro damnis ei adjudicatis infrà quindenam facias ei x. solid. habere, ne inde clamorem audiamus pro defectu tui: vel aliter. Si coram justiciariis in com̃ recuperaverit seysinam suam & illam habere non possit propter potentiam adversarii, & tunc sic. Questus est nobis talis, quòd cùm in curia nostra &c. coram &c. recuperasset seysinam suam versus talem de tenemento in tali villa per assisam novæ disseysinæ inter eos captam: vel aliter per judicium curiæ nostræ de tenemento in N., & unde assisa novæ disseysinæ summonita fuit coram eisdem justiciariis &c. Idem talis non permittit eum uti seysina sua, vel sic quòd seysinam suam nondum habet, secundùm quod ei fuit adjudicata. Et ideò tibi præcipimus, quòd diligenter inquiras, qui fuerunt recognitores ejusdem assisæ, & per eorum visum sine dilatione plenariam seysinam ei habere facias, & ipsum in seysina sua manuteneas & defendas: vel sic, non permittas quòd talis ei molestiam inferat vel gravamen, quo minùs idem talis uti possit seysina sua, ne amplius &c.

FINIS

TRACTATÛS PRIMI LIBRI QUARTI.

there be inserted in the writ a record thus: Know that since A. in our court &c. has instituted an assise of novel disseysine against B. concerning a tenement in such a vill, the said B. came into our said court before our justiciaries and acknowledged the disseysine. And accordingly we enjoin you &c., as above. And let this clause be added in the end of each writ, "and likewise f. 237.
" for damages adjudged to him, within a fortnight cause
" him to receive ten shillings, that we may not hear
" any complaint of your failure to do so." If he has recovered his seysine in the presence of our justiciaries in the county, and on account of the power of his adversary he cannot have it, then thus: So-and-so has complained to us, that when in our court &c., before &c., he has recovered his seysine against such a person of a tenement in such a vill by an assise of novel disseysine held between them, or otherwise by a judgment of our court concerning the tenement in N., and whereupon an assise of novel disseysine has been summoned before our said justiciaries, &c., such person aforesaid does not permit him to enjoy his seysine; or thus, that he has not yet his seysine, according to what has been adjudged to him. And accordingly we enjoin you, that you diligently inquire who were the recognisors of that assise, and by their view without delay cause him to have plenary seysine, and maintain and defend him in that seysine; or thus, and do not allow that such a person shall cause him any molestation or grievance, so as to prevent him from enjoying his seysine, that we may not have any further complaint &c.

HERE ENDS THE

FIRST TREATISE OF THE FOURTH BOOK

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